Calendar No. 516

100TH CONGRESS *1st Session*	SENATE	REPORT 100-272

SATELLITE TELEVISION FAIR MARKETING ACT

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 889

DECEMBER 21 (legislative day, DECEMBER 15), 1987.—Ordered to be printed

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[To accompany S. 889]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 889) to amend the Communications Act of 1934 to provide for fair marketing practices for certain encrypted satellite communications, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

PURPOSE OF THE BILL

The purposes of the bill (S. 889) to amend the Communications Act of 1934 are (1) to require that encrypted satellite cable programming be made available to users of home satellite antennas for private viewing, (2) to require that the satellite cable programmers not discriminate against distributors who are not cable operators, and (3) to have the Federal Trade Commission (FTC) conduct an investigation into the competitiveness of the programming market and to have the Federal Communications Commission (FCC) inquire into the decoder market and the availability of network programming in rural areas.

BACKGROUND AND NEEDS

As part of the Cable Communications Policy Act of 1984 ("Cable Act") (P.L. 98-549), the Congress included language (section 705 of

the Communications Act of 1934) that permits, under certain conditions, the reception for private viewing of unscrambled cable programs delivered via satellite. Whether scrambled programming can be received is not addressed in this language, and the illegal interception provisions of the Communications Act of 1934 continue to apply. This means that the reception of such programming continues to be left to the discretion of the programmer. In addition, this 1984 law does not permit access to television network programming that is delivered by satellite.

Soon after the Cable Act was enacted, programmers, seeing a growing number of people getting their product for free, began to scramble their signals. On January 15, 1986, HBO became the first programmer to scramble its two offerings, HBO and Cinemax. Since then, Showtime/The Movie Channel, CNN, and a host of other services have scrambled their signals.

There is no doubt that the advent of scrambling has had a significant effect on the estimated 1.5–2 million home dish owners. Each of these owners paid about $2,000 to $4,000 for a dish, and most were not told at the time of sale that access to programs could be legally restricted. These people are now faced with spending an extra $400 for a descrambler and must pay for many of the programs they want.

Most dish owners have reconciled themselves to paying for scrambled programming. They believe, however, that the market for programming and for the descrambling hardware has yet to become fully competitive. They say this results in higher prices and lack of choice. In addition, many dish owners continue to demand access to television network signals. It is these problems that the legislation is designed to address.

Legislative History

S. 889 was introduced by Senator Gore on March 31, 1987, with Senators Ford, Bumpers, Pryor, Sasser, Rockefeller, Sanford, and Cochran as co-sponsors. Senators Hollings, Danforth, Bentsen, Daschle, Conrad, McConnell, Burdick, Shelby, Adams, Heflin, Karnes, Pressler, Cohen, Murkowski, and Mitchell subsequently signed on as co-sponsors. The bill amends section 705 of the Communications Act of 1934 to provide for the fair marketing of encrypted satellite cable programming distributed for private viewing. The Communications Subcommittee held a hearing on July 31, 1987, and 13 witnesses testified.

Five bills addressing similar issues were introduced in the 99th Congress: The Satellite Viewing Rights Act of 1985, (S. 1618), introduced by Senator Gore on September 10, 1985, which Senators Cochran and Laxalt cosponsored; The Rural Satellite Dish Owners Protection Act (S. 2290), introduced by Senator Ford on April 11, 1986, which Senators Hatch and Bumpers cosponsored; The Satellite Television Open Market Act (S. 2702), introduced by Senator Gore on July 30, 1986; The Comprehensive Satellite Dish Owners Fairness Act (S. 2666), introduced by Senator Bumpers and Ford on July 21, 1986; and The Satellite Television Security and Fair Marketing Act (S. 2823), introduced by Senators Gore, Ford, and Bumpers on September 16, 1987, which Senators Cochran, Sasser, and

McConnell cosponsored. The Commerce Committee held a hearing on satellite scrambling on July 31, 1986. An effort was made to attach legislation on this subject to the Continuing Appropriations resolution on October 2, 1986. However, the Senate upheld by a vote of 44-54 the ruling of the chair that the amendment was non-germane.

Summary of Major Provisions

S. 889, as reported, requires any person who scrambles a satellite signal which is available to cable customers: to sell that programming to home dish owners; and if other parties are used to distribute the programming, to establish reasonable business standards under which people can become distributors of such programming and not to discriminate among distributors who meet those standards. The legislation prohibits the scrambling of Public Broadcasting Service (PBS) programming unless there is at least one unscrambled feed (signal) of its national service programming. The Armed Forces Radio and Television Service (AFRTS) can scramble its programming only where contractual agreements require scrambling.

The bill permits aggrieved parties to bring civil actions in federal court and gives the court the authority to impose appropriate remedies. The FTC is required to investigate the pricing and distribution practices of companies presently selling satellite programming to dish owners and evaluate the competitiveness of the satellite programming market. The FCC is required to conduct: an inquiry into the availability of and prices charged for decoders; and a rulemaking to determine how to provide network signals to persons in unserved areas.

PUBLIC BROADCASTING SERVICE PROGRAMMING

New subsection (c)(1) of section 705 of the Communications Act of 1934 permits the Public Broadcasting Service to scramble its programming provided that it always has at least one clear feed accessible to satellite dish owners. PBS has five time-zone feeds of its programming. PBS has been testing use of a new system for stereo programming which employs the VideoCipher II (VC II) technology during times when the transponders are not being used to transmit programming.[1] PBS testified at the Communications Subcommittee's July 1987 hearing that if it decides to adopt the VC II system, dish owners who have the VC II decoders can receive the PBS signal without paying any additional fee. In addition, PBS will keep one, non-stereo, program feed accessible without a decoder.

This provision arose from the Committee's concern that PBS might scramble its National Program Service, preventing home dish reception. As originally introduced, S. 889 would have prohibited the encryption of any "satellite delivered Public Broadcasting Service programming intended for public viewing by retransmission by television broadcast stations."

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[1] See, 1987 Scrambling Hearing, Statement of Michael E. Hobbs, senior vice president, policy and planning, Public Broadcasting Service.

While PBS has stated that it has not scrambled any of its regular National Program Service transmissions, it has been running extra transmissions of some programs to test the use of the VC II equipment for encoding digital multichannel sound into its program transmissions. PBS is eager to use that technology as a highly cost-effective means to provide its local member stations stereophonic sound and other technical enhancements. The technology would replace the "DATE" digital audio for television system developed by PBS in the 1970's. The equipment for this system is no longer readily available and, according to PBS, is many times more costly than comparable VC II equipment.[2]

Digital audio encoding would make these improved services freely available to the increasing number of home dish owners who have VC II decoders, as well as to viewers of public television stations, but would interfere with reception by home dish owners who have not yet installed the decoders. PBS assured the subcommittee that it recognizes this problem, and that its Board of Directors has therefore adopted a policy stating its public commitment to maintaining a clear transmission of PBS's National Program Service. According to its policy statement submitted for the record, PBS would encode programs in its National Program Service (which is intended for the general audience) and in its closed-circuit transmissions to its local member stations and its proprietary user-financed services, but would maintain at least one clear unencoded feed of every program that is transmitted in the National Program Service.[3] PBS was concerned, however, that as introduced the bill might have had the effect of precluding its development of multichannel audio services, including stereophonic sound, because of uncertainty as to the scope of the prohibition in new section 705(c)(1).

The Committee appreciates BPS's commitment to maintaining a clear feed of its general audience programs while pursuing the development of digital audio technology. That policy will help to make improved public television services available to the millions who watch public television broadcasts and also to the increasing number of home dish owners who have installed decoders. It will also permit the maintenance of service to the majority of home dish owners who do not yet have decoders. Thus, the bill as introduced has been amended to (1) clarify that the prohibition applicable to PBS is confined to its National Program Service, and (2) provide that as long as PBS provides at least one clear satellite transmission of any program in its National Program Service, additional encrypted or encoded satellite transmissions of the same program shall not be prohibited. The maintenance of a "clear" transmission accessible to home dish owners and the provision of schedule information for that service will involve some additional cost to public television, which should be taken into account in consideration of new legislation and appropriations affecting public broadcasting.

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[2] Id.

[3] Encoded National Program Service transmissions would be digitally encoded, and anyone with a VC II decoder would be able to receive the programming without prior authorization and without subscribing or paying for the service. Encrypted transmissions of proprietary services would be addressed to authorized users.

Some consumers have contended that PBS should not be able to scramble at all because it is funded in part by Federal funds.[4] The proponents of S. 889 believe that such a prohibition would be too restrictive and unnecessary since the language in the bill as reported ensures that they will not be deprived of any programming, while permitting PBS to offer state-of-the-art service. The Committee believes that it is especially important that the programming of public television, which is dedicated to serving the cultural, informational, and educational needs of all citizens, be made available as widely as possible, not only through traditional broadcasts, but through the application of new technologies. PBS pioneered in the satellite delivery of its program service to its affiliates in the late 1970's, which made possible the reception of public television service for millions of Americans who would not otherwise have access to a viewable public television signal.

The Committee does not wish to interfere in any way with public television's outstanding record of technical innovation and that is not the intent of this legislation. The Committee is determined that as nearly as possible all Americans should have access to the best service that public television can provide and believes that public television shares that commitment. The Committee will monitor the advance of technology developments and the effects the restriction provided in the legislation may have on PBS's progress in the future, and will recommend any further amendment in the law that may be required.

The Committee expects that this legislation will encourage rapid growth in the economical availability of decoders to ordinary home satellite dish consumers. When the preponderance of home dishes are equipped with decoders, PBS's high-quality sterophonic sound will provide to those consumers, as well as to broadcast viewers, a public television service that is much superior to that presently available. The Committee intends that PBS's digital audio transmissions should be encouraged, not discouraged, in that context. The Committee is aware that requiring a clean feed may become unnecessary when and if home dish owners all have decoders.

ARMED FORCES RADIO AND TELEVISION SERVICE PROGRAMMING

New subsection (c)(2) of section 705 of the Communications Act of 1934 prohibits AFRTS from scrambling its programming unless such scrambling is required by contract. AFRTS provides programming which is rebroadcast to military personnel and families abroad. That programming consists of entertainment programming and informational programming designed to keep personnel abroad abreast of news from the States. Often the entertainment programming is provided free to the U.S. military abroad by the copyright holders of the programming. This programming is distributed around the world via satellite. As a result, citizens in the United States are able to pick up the signal. Because there has been a great deal of foreign pirating of that entertainment programming,

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[4] See, 1987 Scrambling Hearing, Statement of Diane Davis.

some copyright holders have stated that they will not continue to make it available unless AFRTS agrees to scramble the signal.[5]

S. 889, as originally introduced, only permitted AFRTS to scramble where "multinational" agreements required that the signal be scrambled. Other nations, however, are not signatories to the agreements between the military and the programmers. Therefore, the language was revised to substitute the word "contractual" for "multinational." In order to be able to continue to make the programming available to its military personnel and their families, AFRTS requested that it be permitted to scramble when its suppliers require it to do so. The Committee concluded that since the programming is intended for military personnel, it would permit scrambling where it was required as a condition of making that programming available to AFRTS.

PROGRAM AVAILABILITY

New subsection (c)(3)(A) of section 705 of the Communications Act of 1934 requires any person who scrambles cable satellite programming to make that programming available to home satellite dish owners. The effect of this provision is that any cable programmer that scrambles its service must also sell that programming to dish owners. The purpose of this provision is to ensure that cable programmers do not discriminate against satellite dish owners. Virtually all of the cable programmers that scramble are making their programming available to dish owners.[6] New subsection (c)(3)(A) thus acts as a guarantee and imposes no real burden on cable programmers.

THIRD PARTY DISTRIBUTION

New subsection (c)(3)(B) of section 705 of the Communications Act of 1934 requires any person who encrypts any satellite cable programming service, and permits any other person to distribute such programming to home satellite antenna users for private viewing, to establish reasonable financial and character criteria under which distributors may qualify to distribute such programming to home satellite antenna users. The provisions of subparagraph (B) will sunset within 5 years of enactment of this legislation.

Since the adoption of the Communications Act of 1934, Congress has tried to ensure that the American public has access to a certain level of video programming. Congressional concern has been particularly acute when it comes to people living in rural areas. It is the Committee's believe that if scrambled programming is to be made available to the general public as well as the cable industry, its distribution should be fair and competitive. That is the main objective of the bill.

The evidence presented at the hearing demonstrated that scrambled signals of cable programming are being made available to dish owners at prices comparable to those being charged cable subscrib-

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[5] See, 1987 Scrambling Hearing, pages 238-41, Letter from Jordan E. Rizer, Director, American Forces Information Service, Department of Defense.

[6] One company, HBO, introduced a new program service last spring called Festival which is distributed via Ku-band satellite and is not available to dish owners. See, 1987 Scrambling Hearing, James P. Mooney's responses to Questions of Senator Inouye

ers. At the hearing there was no dispute that all of the cable programming services that scramble now distribute their programming to dish owners.[7] In addition, according to the FCC and the National Cable Television Association (NCTA), there are over 70 cable programs services that are not currently scrambled.[8] Further, of these unscrambled signals, only about 20 have plans to scramble.

Because of the individual pricing policies of each cable operator, it is difficult to compare the prices paid by home dish owners with those paid by cable subscribers. For example, the price for a service, such as HBO or Showtime, may be lower for cable subscribers in a certain area than for dish owners. However, on average the prices appear to be similar: $10.44 for the cable subscriber versus $12.95 for dish owners for HBO (or less than $10.00 with a year's subscription) and $10.50 for dish owners for Showtime (or $10.00 with a year's subscription.[9] Moreover, unlike cable subscribers, dish owners do not have to purchase other services to have access to these movie channels.

Dish owners argue that while some retail prices may be comparable, this is not the proper standard upon which to judge this issue. They point to the fact that they receive programs the same way cable operators do (via satellite) and should pay the same as cable subscribers, if not less, since it is the dish owner (unlike the cable subscriber) who has made the capital investment by purchasing the equipment. The programmers respond that the success of their product has depended on cable service and that such a pricing scheme would unfairly jeopardize their prime source of revenues.

The Committee believes it is less important to focus on prices and more important to focus on the market structure. Specifically, the Committee is concerned about the incentives to discriminate against home dish owners because of the vertical integration of cable operators and programmers. Such a market structure will almost certainly lead to favoritism to the disadvantage of the dish owner.

Examples of the ownership patterns in the cable industry demonstrate these close links. Viacom, which owns 18 systems serving 1.1 million subscribers, also owns the following programming services: Showtime; The Movie Channel; MTV; Lifetime; Nickelodeon; and VH-1. Similarly, ATC/Time Inc., which owns 615 systems serving 3.6 million subscribers, also owns HBO and Cinemax. In addition, major movie studios are cable operators. For example, the sixth largest multiple system operator (MSD) is Warner Communications. In several instances, MSO's have financial interests in cable programmers—TeleCommunications, Inc. (TCI) and many of the cable operators also have financial interests in Turner Broadcast-

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[7] See, 1987 Scrambling Hearing, Statements of Peter Pitsch, Chief of Staff, Federal Communications Commission, and James P. Mooney, president, National Cable Television Association.

[8] According to the NCTA, there are over 100 program services that are not scrambled. See, 1987 Scrambling Hearing, Statement of James P. Mooney.

[9] See, 1987 Scrambling Hearing, Statement of James P. Mooney, president, National Cable Television Association. It should be noted, however, that there are variations in the prices charged dish owners depending on the number of program services they purchase and the number of months purchased. Thus, it is cheaper to purchase most services if the dish owner prepays for an entire year, rather than paying monthly.

ing System.[10] As a result, the Committee is concerned that cable programmers may withhold or price non-competitively their programming to the home satellite dish market.

The Committee believes that the testimony presented recently shows that programmers are not permitting their programs to be sold by unaffiliated parties. This creates a climate where dish owners are beholden to cable operators and programmers and thus pay higher prices and have less choice. This position is supported by the fact that there are only a few significant cable program packages in existence and that most if not all are controlled by cable programmers.[11] Viacom, HBO, and TCI are the only companies that have packages on the market containing cable programming.[12] There are more packages of superstations—broadcast stations carried on cable—and those packages are not all controlled by cable programmers.[13] However, superstations only account for a small part of the cable programming business.

The purpose of new subsection (c)(3)(B) is to facilitate the emergency of competitive distributors of satellite cable programming to home satellite dish users. It is anticipated that by the time the requirements of subparagraph (B) expire, the marketplace will have developed sufficiently so as to ensure continued competition in program distribution.

As contemplated in this section, "distribution" consists of the provision for home satellite dish users to receive electronic transmissions directly from the satellite. It is assumed that the actual satellite signal always remains under the control of the person who encrypts. The statute does not require any satellite cable programming service to permit additional electronic transmissions of its programming.

It is the responsibility of the person who encrypts to establish reasonable financial and character criteria against which to measure the qualifications of those who would wish to qualify as distributors. These criteria include commonly prudent business standards designed to (1) facilitate payment to the person who encrypts, and (2) maintain the business reputation of the person who encrypts.

The following examples of criteria that would meet the above-referenced standard are illustrative only. The person who encrypts must make his own *bona fide* determinations in fashioning criteria.

Criteria in the first category—to facilitate payment—could include requirements that a potential distributor—

—demonstrate the availability of sufficient economic resources and the ability to meet financial and other obligations to the programmer;

—post performance or similar types of bonds, deposits, guarantees, or other means of ensuring payment to the programmer; and

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[10] See, 1987 Scrambling Hearing, pages 104-5.

[11] See, 1987 Scrambling Hearing, Statement of James P. Mooney.

[12] Since the July 31, 1987 Scrambling Hearing the Committee has learned that there is at least one third-party packager, the National Rural Telecommunication Cooperative, offering a program package that includes cable programming.

[13] Turner Broadcasting System owns one superstation, WTBS in Atlanta, which provides cable programming and is a cable operator.

—evidence experience in serving consumers, including expertise in the home satellite antenna market.

Criteria in the second category—to maintain the business reputation of the person who encrypts—could include requirements that a potential distributor—

—comply with established standards for the advertising, promotion, and marketing of the programming product;

—demonstrate technical competence in the delivery of program services; and

—not package or market the programming product with another product in a way that may, in the good faith judgment of the person who encrypts, adversely affect the stature or reputation of the first product (*e.g.*, a children's programming service could reasonably object to being marketed jointly with a programming service intended for mature audiences).

The bill, as reported, prohibits any person who encrypts from discriminating between the distribution of satellite cable programming to distributors for cable television subscribers and the distribution of such programming to distributors for home satellite antenna users. This prohibition is designed to ensure that a person who encrypts does not unreasonably deny or place conditions on the availability of such programming to those seeking to distribute to home satellite antenna users. In the Committee's view, a decision expressly to permit cable television system operators to distribute programming to home satellite antenna users and not to permit "independent" non-cable distributors to do so would be presumed to constitute unreasonable discrimination. However, in the event that a person who encrypts has in good faith established financial and character criteria in accordance with this Act, and no "independent" non-cable distributor meets them or comes forward, the person who encrypts has fulfilled his obligation hereunder.

Distinctions based on appropriate business considerations and applied in good faith are consistent with the intent of this section. For example, a person who encrypts may offer volume discounts.

DEFINITION OF PROGRAMMERS

For the purpose of this bill, the Committee intends that the term "programmers" means those who sell satellite-delivered services directly to cable. It is not intended that sports leagues, like major league baseball, in making games available to programmers for further distribution, come under the definition of programmers. Major league baseball, in this case, operates much like the movie studios, providing copyright services to programmers such as HBO. If, however, a sports league were to establish its own programming service, the baseball channel, for example, it would come under the definition of programmer in this bill.

UNAUTHORIZED DISTRIBUTION OF DECODERS

New subsection (2)(c)(4) of section 705 of the Communications Act of 1934 prohibits the unauthorized promotion, manufacture, or sale of decoding equipment. The purpose of this provision is to enhance the penalties for the unauthorized distribution of decoding equipment. Although there is a similar provision in section 633(a) of the

Communications Act of 1934, added by the Cable Act, the penalty provisions for the two sections are significantly different. The maximum penalties for a violation of section 633(a) are $50,000 or 2 years imprisonment, or actual damages and the profits of the violator. The maximum penalties for the violation of new section 705(c)(4) are injunctive relief and up to $500,000 in damages, even in the absence of a showing that the violator did not make significant profits.

The major purpose of this provision is to deter pirating of scrambled signals through the use of unauthorized equipment. This problem became particualrly acute in late 1986 and early 1987. The manufacturer of the decoders, General Instruments, took several steps to prevent the sale and use of illegal decoders including alerting the public not to purchase them, shutting off illegal decoders, establishing a 30-day amnesty program (during which illegal decoders were corrected free of charge), and instituting legal actions against persons marketing illegal decoders.[14] Despite these actions, the problem persists. Accordingly, this Committee believes that additional measures are needed to deter the black marketing of illegal decoders.

PENALTY PROVISIONS

New subsection (c)(5) of section 705 limits the remedy for a violation of new subsection (c)(3)(A), the duty to make programming available to home dish owners, to injunctive relief. Thus, any person who has been denied access to scrambled programming may seek injunctive or other equitable relief in a U.S. district court. As originally drafted this provision would have permitted monetary damages of up to $500,000. However, this would have been unduly burdensome on programmers. The Committee's intent was not to create monetary incentives for people to sue, but to deter program distributors from discriminating against dish owners. A flood of lawsuits could incapacitate the providers of programs. The purpose of the provision as amended is to ensure that scrambled programming available to cable subscribers be accessible to satellite dish owners. That goal will be achieved by limiting the remedy to injunctive relief or other equitable relief.

New subsection (c)(6) of section 705 sets forth the remedies for violations of new subsection (c)(3)(B) the duty to make programming available to qualified distributors, and new subsection (c)(4), the unauthorized sale or distribution of decoding equipment. An aggrieved party may bring an action under paragraph (6)(A) in a U.S. district court seeking injunctive relief to prevent or restrain violations, or under subparagraph (6)(B) to recover costs including actual damages or statutory damages not to exceed $500,000. The monetary limit does not apply to each violation separately, but is the maximum a defendant can be required to pay for all of the violations against one plaintiff. The reference to costs does not include attorney fees. The bill as originally introduced did permit recovery for attorney fees, but that language was deleted from the bill.

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[14] See, 1987, Scrambling Hearing, Statement of Larry Dunham, executive vice president and general manager, VideoCipher Division, General Instrument Corp.

DEFINITIONS

New subsection (c)(7)(A) of section 705 defines "satellite delivered programming" as "video programming transmitted by a domestic communications satellite intended for reception by cable television system subscribers" and does not include "the signal of an affiliate of a national broadcast network that is retransmitted by satellite. . . ." As introduced the bill could have been interpreted as including nonbroadcast services such as HBO and network affiliate signals that are retransmitted by satellite carriers for reception by cable systems. (Television stations that are retransmitted by satellite to cable systems are known as "superstations.") The signals of several network affiliates are now delivered by satellite carriers (such as CANCOM and Prime Time Relay Corporation), in scrambled form, to cable systems. If read broadly, the bill would have required these satellite carriers to make network affiliate superstation signals available to any home dish owner.

This result was not intended. Section 5 of the bill calls upon the FCC to determine how to make network television programming available to households in "white areas"—the 1 or 2 percent of U.S. households that cannot now receive such signals. It is through this careful FCC review that the bill deals with delivery of network programming to dish owners.

A requirement to deliver network affiliate "superstation" signals to all home dish owners would also be inappropriate to address in this bill. By requiring delivery of network superstation signals to dish owners who are among 98 or 99 percent of Americans who have network service through a local affiliate, the bill would require invasion of the exclusivity of hundreds of network affiliate stations. That exclusivity has played a crucial part in enabling the network/affiliate system to provide programming, through a local broadcaster, to virtually all American households.

Finally, such a requirement would be unworkable because it would completely fail to deal with the copyright problems that are created when third parties retransmit broadcast signals. Unlike retransmissions to cable systems, which are dealt with by Section III of the Copyright Act, it is unclear whether there is any current mechanism for dealing with the copyright problems created by the retransmission of broadcast signals to dish owners. That issue is now being litigated in Federal district court.

Representative Kastenmeier has introduced a bill, H.R. 2848, that would specifically address the copyright problems created by the retransmission of broadcast signals to home dishes. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee is now considering that bill.

VIDEOCIPHER II DESCRAMBLING SYSTEM

Section 3 of the bill requires the FCC to conduct an inquiry into the availability of, and prices charged for, VideoCipher II decoders. This provision is a direct result of the fact that there had been a shortage of decoders and the price of decoders appeared to be rising. Dish owners claim that these problems were the result of the fact that General Instruments has a legal monopoly on the VC

II technology and is the only manufacturer of the decoders. The result of this shortage, dish owners argue, has been reduced demand for satellite dishes and programming (consumers want to purchase the decoders at the same time they purchase the dishes), an increase in the black-market industry for illegal decoders, and an increase in the price of the VC II decoders.[15]

Last year the VC 11 stand-alone decoder was sold wholesale for $325 with a recommended retail price of $395. The wholesale price of the stand-alone decoder is still $325 according to General Instruments. Consumers have complained, however, that the retail price has gone over $400. General Instruments believes that certain retailers or people pirating the decoders are taking advantage of the decoder shortage and are the reason for any price increase. In addition, General Instruments claims that there will not be a great drop in the price because it established the initial price lower than is customary for electronics products, since it believed there would be sufficient immediate sales to recover its investment. Finally, General Instruments testified at the Committee hearing that the effective price of the decorder will drop as it is incorporated into satellite receivers. General Instruments has so far licensed 14 manufacturers to incorporate decoder modules into home receivers.[16]

It is further argued by the satellite dish industry that these problems are exacerbated because General Instruments is providing decoders to its own dealers in large quantities, driving competitors out of the market.[17] The evidence presented at the Committee hearing demonstrates that General Instruments has taken steps to eliminate the shortage problem. As a result, the prices of decoders should return to their suggested retail price. Consequently, legislation on this issue is not necessary. However, section 3 of S. 889 requires the FCC to monitor this situation and report back to Congress within 150 days of enactment. In addition, in an effort to avoid such shortages and price hikes in the future, the FCC is required to review the availability and pricing of decoders semiannually and to report back to this Committee.

In the FCC's first report on the dish market, adopted by the FCC on February 12, 1987, it examined whether it needed to establish a uniform standard for the encryption of satellite signals. The FCC determined that the market has settled on the VC II system. This was developed by MaCom, which was subsequently acquired by General Instruments. The FCC report indicated that all of the cable programmers who scramble or intend to scramble their signals are going with the VC II system. Both the FCC and the NCTA assert that no cable programmers are planning to use another technology.

Despite the FCC's conclusion, there was concern that in the coming years programmers might decide to change their scrambling system. This could mean that dish owners would be forced to purchase new and possibly multiple decorders in order to receive

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[15] See, 1987 Scrambling Hearing, Statement of Frederick Finn, Home Satellite Television Association.

[16] See, 1987 Scrambling Hearing, Statement of Larry Dunham, executive vice president and general manager, VideoCipher Division, General Instrument Corp.

[17] See, 1987 Scrambling Hearing Testimony of Fredrick W. Finn, Home Satellite Television Association.

different programming. Based on the evidence presented at the hearing, however, the Committee believes that is unlikely, particularly in view of the substantial investment made by General Instruments, programmers, and cable operators. The Committee is also concerned that the adoption of a standard might freeze the technology. Finally, the evidence presented at the hearing indicates that an FCC inquiry into setting a standard would cause manufacturers to delay increased production of descramblers, further exacerbating any shortages. The Committee therefore is not requiring, as originally provided in S. 889, that the FCC institute a proceeding to establish a scrambling standard.

MARKETING PRACTICES

Section 4 requires the FTC to conduct an investigation into the pricing and distribution terms and practices of programmers currently selling satellite television programming to home dish owners to determine if the market is developing competitively. The FTC is also empowered to establish appropriate remedies should it determine that the satellite programming market is not developing competitively.

The satellite dish industry is a relatively new industry and has not fully developed. Because of the vertical integration of the cable operators and programmers, the Committee is concerned that there is little incentive for cable programmers to make their programming available to satellite dish owners at competitive prices. This bill requires the programmers to make their programming available to dish owners and to third party packagers. The FTC, upon completion of its review, will be in a position to determine if any additional measures may be necessary to ensure that the satellite television programming market functions competitively.

NETWORKS

Section 5 of the bill requires the FCC to conduct a rulemaking to determine how to make television network broadcast signals available to the maximum number of persons who are unable to adequately receive such signals from a local licensee. Today, network programs reach about 98 percent of the American public. With satellite dishes, the 2 percent of the population in sparsely populated areas have an opportunity to receive these programs. The television networks, however, are considering scrambling their signals to protect their local affiliates. The issue is how the networks can serve those who live in areas that do not receive network signals while protecting local broadcasters and local broadcasters' public interest obligations. Scrambling does offer some alternatives that may balance those interests because the technology has the capability to permit descrambling by zip codes, which could be keyed to these unserved areas.

At present ABC and CBS have stated that they plan to scramble. ABC has not indicated what system it plans to use, and CBS seems to be leaning towards using the VC I system because it is more difficult to penetrate than the VC I system because it is more difficult

to penetrate than the VC II system. However, neither company has stated when it plans to commence scrambling.[18]

Recently, NBC and its Denver affiliate entered into an agreement with a company called Netlink (owned by TCI) to distribute the affiliate's signal to those whw are incapable of receiving NBC programming.[19] While this arrangement may strike a proper balance between the interests of network affiliates and dish owners, some dish owners have criticized the price, $25/year, and the fact that it will not be distributed where affiliates provide service. NBC testified at the hearing that it will not receive any of that money and that it will be used by Netlink to cover its costs. NBC also testified that the restrictions on reception are essential if network affiliates are to continue to meet their public interest obligations.[20]

The Committee feels strongly that network programming should be made available to as many Americans as possible, including those people who can only receive such signals by using satellite dishes. On the other hand, the Committee also recognizes that in the case of the networks, there are unique problems that must be addressed, such as the need to protect those portions of their signals that are not intended for public viewing. While this problem could be resolved by the retransmission of a local signal intended for public viewing, such a signal does include local programming aimed at the community that particular station serves. Other affiliates might object because it would undermine their local programming efforts. To determine the best way to resolve this problem, the Committee in section 5 of the bill instructs the FCC to examine this situation in a rulemaking proceeding.

VOLUME DISCOUNTS

During the Committee consideration of S. 889, Senator Pressler offered an amendment to prevent any discrimination, that is not specifically cost-justified, in prices, in terms or conditions offered by cable program service providers. It was argued that the current practice of "volume discounting" by program providers has left the smaller cable companies at a competitive disadvantage in purchase programming. Objections were raised by Senator Wilson, including the concern that the amendment would lead to price regulation. Because of time constraints, the amendment was not fully considered and no vote was taken. However, the Committee does recognize that concerns have been raised by small cable companies over the disparity in prices charged for programming and that it is appropriate for the issue to be considered when S. 889 is brought before the full Senate.

CONCLUSION

The crux of this legislation is to ensure that satlelite cable programming be made available to the owners of satellite dishes. The Committee found it very troubling that initially there was some reluctance on the part of the cable programmers to make their pro-

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[18] See, First Report, at 21.

[19] See, 1987 Scrambling Hearing, Statement of Raymond J. Timothy, group executive vice president, National Broadcasting Co. Inc.

[20] Id.

gramming available to home dish owners. The majority of the owners of satellite dishes are persons who reside in rural parts of the country—persons who have little or no access to receive local over-the-air television broadcast signals and do not have access to cable. Provision of video service to rural areas has always been of great concern to this Committee and the satellite dish is one technology that addresses this problem. The Committee is aware that this legislation does not completely solve the mass media communications problems facing Americans residing in rural areas. However, it is a large step in the right direction.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, December 4, 1987.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 889, the Satellite Television Fair Marketing Act, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, November 19, 1987. We expect that implementation of the bill would not result in significant cost to the federal government.

S. 889 would require programmers who scramble satellite signals that are available to cable customers to make such programming available to satellite-dish owners. In addition, programmers who make their signal available to third parties for distribution would be required to establish reasonable business standards under which other parties interested in distributing the signal would be allowed to do so. Another provision of the bill would permit any person aggrieved by a violation of the proposed law to bring a civil action in federal court. In turn, the bill would give the court the authority to impose appropriate remedies.

The Federal Communications Commission (FCC) and the Federal Trade Commision (FTC) would be required to undertake studies regarding the availability of programming to satellite-dish owners. In addition, the FCC would be required to conduct a rulemaking to facilite the provision of network braodcasting signals to persons unable to receive a signal from a local licensee. These efforts are not expected to result in significant cost to the federal government.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This legislation requires cable programmers to make satellite television programming available to owners of home satellite dishes. Sections 3 and 5 of this legislation require the FCC to conduct studies examining the availability of decoding equipment to consumers and the availability of television network service to persons in rural areas. Section 4 of this legislation requires the FTC to conduct an inquiry to determine if the satellite television programming market is developing competitively. All of these requirements are intended to ensure that the maximum number of people possible receive television service.

ECONOMIC IMPACT

This legislation will have minimal impact on the Nation's economy.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals affected.

PAPERWORK

There should be no change in the paperwork requirements of the FCC. There may be a slight increase in the paperwork required of the FTC because of the study mandated under section 4, but it should not be significant. With respect to the FCC studies mandated under sections 3 and 5 regarding decoding equipment availability and network service availability in rural areas, there should not be any significant increase in paperwork since FCC already has an ongoing proceeding examining the scrambling of satellite television programming.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section of the bill states the short title of the bill, the "Satellite Television Fair Marketing Act."

SECTION 2.—FAIR MARKETING OF CERTAIN SATELLITE COMMUNICATIONS

This section amends section 705 of the Communications Act of 1934 to make technical and confroming changes to accommodate the addition of a new subsection (c).

Paragraph (1) of this new subsection prohibits the encryption of satellite delivered public broadcasting service programming unless at least one clear, unencrypted, feed of such programming is maintained at all times.

Paragraph (2) of this new subsection prohibits scrambling by AFRTS programming unless required by contractual agreements.

Paragraph (3)(A) requires any person who encrypts any satellite cable programming for private viewing to make such programming available to home satellite dish owners.

Paragraph (3)(B) requires any person who encrypts any satellite cable programming and makes such programming available through any other person to establish reasonable financial and character criteria under which other parties who wish to distribute such programming to home satellite dish owners may qualify. This provision also prohibits discrimination between distributors of programming to cable subscribers and those to home satellite dish owners. This provision will sunset 5 years from the date of enactment.

Paragraph (4) prohibits the promotion, marketing, or sale of encrypted satellite programming without the authorization of the person encrypting such programming.

Paragraph (5) permits any person aggrieved by a violation of new subparagraph (c)(3)(A) to seek injunctive or other equitable relief in a U.S. district court.

Paragraph (6) permits any person aggrieved by a violation of subparagraph (c)(3)(B) or (c)(4) to bring a civil action in a U.S. district court and such court may (A) grant injunctive relief, and (B) direct the full recovery of costs to the plantiff or statutory damages not to exceed $500,000.

Paragraph (7) defines: (A) "satellite delivered programming" as video programming transmitted by domestic satellite intended for reception by cable television system subscribers (which term does not include the signal of an affilate of a national broadcast network that is retransmitted by satellite or any internal satellite communication of any broadcaster or broadcast network); and (B) "reasonable financial and character criteria" as meaning commonly prudent business standards created to facilitate payment to the programmer and maintenance of the business reputation of the programmer and created to encourage the establishment of multiple noncable distributors.

SECTION 3.—FEDERAL COMMUNICATIONS COMMISSION NOTICE OF INQUIRY INTO DECODER AVAILABILITY

Subsection (a) requires the FCC to conduct a study to determine whether consumers are being unreasonably denied access to satellite programming because of price or a shortage of decoders.

Subsection (b) requires the FCC to complete the study within 120 days of the effective date of this Act.

Subsection (c) requires the FCC to conduct a semiannual review and report to Congress on the effect of decoder price and availability on satellite dish owners.

SECTION 4.—FEDERAL TRADE COMMISSION INVESTIGATION INTO PROGRAM MARKETING PRACTICES

Subsection (a) requires the FTC to conduct an investigation, within 120 days of the effective date of this Act, into the pricing and distribution terms and practices of persons selling satellite programming to home satellite dish owners to determine if the market is competitive.

Subsection (b) authorizes the FTC to establish appropriate remedies to produce adequate competition if the FTC determines that the market is not developing competitively.

SECTION 5.—AVAILABILITY OF NETWORK PROGRAMMING TO RURAL AREAS

This section requires the FCC to conduct a rulemaking to ensure to the greatest extent possible the provision of network broadcasting signals to persons unable to receive such signals over the air from a local licensee. The FCC is required to consider the following in making its determination:

(1) the extent to which residents of rural and underserved areas cannot receive broadcast transmissions;

(2) the extent to which any Federal rules inhibit local broadcast stations from providing service to such persons;

(3) the potential for serving such people with home satellite dishes to receive scrambled programming; and

(4) mechanisms by which the networks can protect those portions of their transmissions not intended for public viewing, while making the scrambled signal available to those persons living in rural and underserved areas outside the contours of local broadcast station signals.

SECTION 6.—EFFECTIVE DATE

This section makes the provisions of this Act effective 30 days following its enactment.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE COMMUNICATIONS ACT OF 1934

Section 705 of that Act

UNAUTHORIZED PUBLICATION OF COMMUNICATIONS

SEC. 705. (a) * * *

(b) * * *

(c)(1) No person shall encrypt or continue to encrypt satellite delivered public broadcasting service programming intended for public viewing by retransmission by television broadcast stations, unless at

least one clear, unencrypted national satellite transmission feed to such programming is maintained at all times.

(2) No person shall encrypt or continue to encrypt satellite delivered Armed Forces radio and television service programming, unless such encryption is required under contractual agreements.

(3) Any person who encrypts any satellite cable programming for private viewing shall—

(A) make such programming available for private viewing by home satellite antenna users; and

(B) when making such programming available through any other person, establish reasonable financial and character criteria under which distributors may qualify to distribute such programming to home satellite antenna users and not discriminate between the distribution of such programming to distributors for cable television subscribers and distributors for satellite antenna users, nor among different distributors offering similar distribution services to home satellite antenna users, except that this subparagraph shall remain in force for a period not to exceed 5 years after the date of enactment of this subparagraph.

(4) No person shall promote manufacturer, market, or sell equipment which enables or assists in enabling the reception of encrypted satellite delivered programming without the authorization of the person encrypting such programming.

(5) Any person aggrieved by any violation of paragraph (3)(A) of this subsection may bring a civil action, against any other person who encrypts any satellite cable programming for private viewing, in a United States district court or in any other court of competent jurisdiction. Such court may grant temporary and final injunctions or other equitable relief on such terms as it may deem reasonable and appropriate to prevent or restrain such violations.

(6) Any person aggrieved by any violation of paragraph (3)(B) or (4) of this subsection may bring, in any United States district court or other court of competent jurisdiction, a civil action against any other person who encrypts any satellite cable programming for private viewing and unreasonably discriminates among distributors. Such court may—

(A) grant temporary and final injunctions on such terms as it may deem reasonable and appropriate to prevent or restrain such violations; and

(B) direct the recovery of full costs to a prevailing plaintiff, including actual damages, or statutory damages for all violations in a sum of not more than $500,000, as the court considers just.

(7) As used in this subsection, the term—

(A) "satellite delivered programming" means video programming transmitted by a domestic communications satellite intended for reception by cable television system subscribers and does not include the signal of an affiliate of a national broadcast network that is retransmitted by satellite or any internal satellite communication of any broadcaster or broadcast network; and

(B) "reasonable financial and character criteria" means commonly prudent business standards designed to facilitate payment to the programmer and maintenance of the business repu-

tation of the programmer, and which are designed to facilitate the existence of multiple noncable distributors.

[(c)] *(d)* For purposes of this section—

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite; and

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use.

[(d)] *(e) (1)* Any person who willfully violates subsection (a) shall be fined not more than $1,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $25,000 or imprisoned for not more than 1 year, or both, for the first such conviction and shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court may—

(i) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a);

(ii) award damages as described in subparagraph (C); and

(iii) direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the

elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation involved in the action in a sum of not less than $250 or more than $10,000 as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $50,000.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100.

(4) The importation, manufacture, sale, or distribution of equipment by any person with the intent of its use to assist in any activity prohibited by subsection (a) shall be subject to penalties and remedies under this subsection to the same extent and in the same manner as a person who has engaged in such prohibited activity.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this title.

(6) Nothing in this subsection shall prevent and State, or political subdivision thereof, from enacting or enforcidng any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a).

[(e)] *(f)* Nothing in this section shall affect any right, obligation, or liability under title 17, United States Code any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law.

ADDITIONAL VIEWS OF MR. KERRY

For the reasons set out below, I have grave reservations about S. 889, the Satellite Television Fair Marketing Act. I believe that Senate action on the bill at this time is premature, to say the least. The bill will not achieve the goals its supporters claim, and its passage will disrupt a new market that is already developing in a fair and competitive fashion without unwarranted government interference.

BACKGROUND

Last year, following a congressional oversight hearing which addressed the availability of scrambled programming, video programmers began to package their services. These services are becoming increasingly widespread, and are priced at or below comparable packages purchased from cable television systems. A representative home satellite package offers these components:

A multiservice package

—CBN (Family entertainment, including comedies, children's shows, and Western Weekends).
—CNN (24 hour news).
—The Discovery Channel (programs about science, nature and the environment).
—ESPN (the all-sports network).
—Headline News (top news stories every half hour).
—The Learning Channel (educational programming).
—Lifetime Cabletelevision Network (programming directed at women of all ages).
—The Nashville Network (country music and special programming).
—Nickelodeon (the first network for children).
—USA Network (24 hour entertainment).
—VH-1 (adult contemporary music videos).

Two "Pay TV" services

—Showtime (popular films, concerts and other special events).
—The Movie Channel (24 hour movie programming).

A home dish owner can subscribe to either of the "Pay TV" services, or to the Multi-service package, for $10.95 per month or $120.00 per year. The entire package of both pay services and the multi-service package can be purchased for $22.95 per month, or $240.00 per year.

Other packages are available, and there are additional program services that can be purchased on an individual basis. The cost of these services to the home satellite household are comparable, and

in many cases significantly lower, than the cost of identical packages to cable TV households.

Thus, it is clear that the fundamental premise underlying the legislation is flawed. Home dish owners have an abundance of programming services from which to choose, and can obtain programs at or below prices by cable subscribers for similar program packages. These conclusions are not simply a matter of opinion, but are supported by a carefully assembled factual record assembled by the Federal Communications Commission. In its report on satellite signal scrambling 2 FCC Red. 1669 (1987) and in subsequent quarterly progress reports—the most recent of which was completed just last September—the FCC has found that the market for programming is developing in a competitive fashion and that programming is becoming available to home satellite dish households "from several sources at prices comparable to or below those paid by cable subscribers". In short, there is no need for Congress to intervene in this market.

ANALYSIS

Section 2(c)(3) of S. 889 purports to encourage the development of a competitive program packaging industry. As shown above, such an industry has already developed. Packages of programming are available at competitive rates. The effect of section 2(c)(3) of S. 889 would be to reduce the number of program services contained in packages, and to increase rates for home dish owners. In my view, neither is an attractive alternative.

If enacted, the legislation will force a programmer to make a choice. It can supply its service on a wholesale basis to many program packagers, or it can retail the service directly to dish owners. While some program services would continue to act as wholesalers, and allow third parties to package their own and other services for customers, other programmers would choose the retail business and refuse to wholesale their product.

During the course of the Commerce Committee's hearing on this bill, testimony was presented that indicated that program services have sound business reasons for exercising caution in dealing with distributors. Concerns such as reliability, dependability, relations with current distributors, and quality of service are of great significance when a wholesaler decides who will represent him in the marketplace. It is likely that, given the open-ended requirements of the legislation, many program services will elect to avoid the problems of dealing with multiple distributors, and simply retail their service on an individual basis to home viewers.

The result of this would be to reduce the overall number of services that are available to packagers, and increase the number of services that are sold individually to home dish owners. Home dish owners would wind up spending more for programming, because they would have to deal individually with every service that elected to sell in the retail market. By requiring program services to choose either the wholesale or the retail market, the legislation will have the perverse effect of increasing consumer costs, and decreasing the overall number of programs available for inclusion in packages of programming.

The amount of programming available to dish owners will not increase as a result of this legislation. The only increase will be in the number of program packagers, each distributing packages composed of services drawn from the same pool of available programming. Each packager will have to establish the infrastructure (billing and support operations) necessary to service the market, resulting in needless duplication and higher costs that will ultimately be borne by the consumer.

Moreover, in its attempt to fix a non-existent problem, the legislation will result in higher prices for consumers, and a reduction in the number of program services available on a packaged basis.

Even if one were to accept the premise of S. 889 that there is inadequate access to scrambled programming, the approach contained in this legislation would still be seriously flawed because it singles out one technology, the home satellite dish, and locks it in place while discriminating against the development of other promising technologies which have much to offer the American public.

The apparent objective of this bill is to promote competition in the distribution of satellite television programming to home viewers. But the supposed pro-competitive features of the bill are made available only to users of home satellite dish technology. In many areas of this country—such as urban and suburban areas in Massachusetts—there are other technologies which are, or can be in the future, equally if not more important alternatives to cable TV or broadcasting of video entertainment. These technologies include, for example, wireless cable services.

Is there any rational basis for excluding wireless cable and other non-cable technologies from this bill, if what we really seek to accomplish is to enhance competition in the distribution of satellite programming—not just competition between distributors to satellite dish owners but among all distributors to all home viewers?

I do not believe so, but that is exactly what we are doing in this legislation. If one accepts the thrust of this bill, if one accepts that its pro-competitive features are necessary to deal with the alleged cable monopoly, then it should apply fairly and uniformly across-the-board.

CONCLUSION

This legislation is seriously flawed. It seeks to address a perceived failure in the market, where no such failure has been shown to exist. An abundance of satellite delivered video programming is available today, at rates at or below those charged for comparable services to cable subscribers. Moreover, in its attempt to fix a non-existent problem, the legislation will result in higher prices for consumers, and a reduction in the number of program services available on a packaged basis.

The existing marketplace is working well. The Federal Government should refrain from interfering in it, to the detriment of program producers and home dish owners alike.

JOHN F. KERRY.

ADDITIONAL VIEWS OF MR. PRESSLER

I plan to offer on the Senate floor the following amendment, designed to prevent unfair discrimination against small cable distributors:

On page 3, line 4, insert the following new subsection:

> "(C) not discriminate in price, terms or conditions between the distribution of such programming to distributors for cable television subscribers and to distributors for satellite antenna users, nor among such distributors. Provided, however, that nothing contained herein shall prevent those differentials which make only due allowance for the differences in the cost of creation, sale or delivery."

The purpose of this amendment, as of the entire bill, is to assure adequate competition in the delivery of cable satellite programming. The difficulties encountered by potential distributors of programming to home satellite antenna users have been specifically dealt with in the legislation by prohibiting discrimination in the wholesale price charged to those distributors fo such programming. This amendment would also prohibit discrimination in the wholesale rate charged to deliverers of that programming via cable television systems. That discrimination exists today, as was determining during the Committee's hearings. The practice of volume discounting" of programming—with very substantial discounts going to the largest cable television corporations—has resulted in a competitive imbalance between the largest operators and the rest of the cable competitors in the business.

This amendment would prohibit unfair discrimination in such areas as price, terms and conditions among cable television distributors. This would not prevent price variables that could be cost justified and is consistent with legal and market concepts long established regarding wholesale distribution.

LARRY PRESSLER.

ADDITIONAL AND MINORITY VIEWS OF MESSRS. INOUYE AND STEVENS

Despite the efforts of the authors to make positive changes, S. 889, the Satellite Television Fair Marketing Act, is bad legislation. Its foundation rests on circumstantial, anecdotal, and unproven claims. Its edifice contains ill-conceived and expensive remedies. Its precedential value is troublesome. We urge our colleagues either to improve it by amendment or reject it outright.

The television receive-only (TVRO) satellite dish market was created by a decision of the Federal Communications Commission (FCC) about 10 years ago. The Commission permitted persons to own these dishes but without any guarantee that reception would be protected from interference. These TVRO owners, moreover, still had to comply with the illegal interception language in the Communications Act (section 705) and the copyright laws, as well as other pertinent federal, state and local laws, such as zoning requirements.

With this decision and the lowering of TVRO prices, this market burgeoned, and today there are about two million TVRO owners. During this growth period, the questions of illegal interception and copyright remained, and in 1984, the Congress, in the Cable Telecommunications Act, passed a new section 705 that permitted the reception of unscrambled satellite programming under certain conditions. The rationale for this law was that programmers should only be able to control products where they make the effort—by scrambling—to do so.

Soon after this law was passed, programmers either began to scramble or announce their intention to do so. They could no longer afford to give their product away to such a large market without harming their basic business. At the same time, TVRO sales were escalating. The difficulty was that many TVRO sellers were not telling buyers that scrambling was coming and that they were not entitled under law to receive such programming. A recent survey in Satellite Orbit magazine showed that over one-half the TVRO owners said they were not so informed. When these TVRO buyers were eventually informed, they were not surprisingly angry, but not at the sellers who misrepresented the product. Rather, they were angry at the programmers who had a perfect right to scramble in order to protect their product. It is this situation that the Congress has been called upon to address.

There are also other related issues before the Committee. The proponents of S. 889 argue that the programmers and cable companies are engaged in anti-competitive acts. If such acts have occurred, we would be greatly troubled and would be the first to urge governmental action. But, as we will discuss below, the Committee has no proof of such acts.

THE RIGHT OF ACCESS

S. 889 gives TVRO owners a right of access to cable programming delivered via satellite. The authors of this legislation compare this to the compulsory copyright license that permits cable operators to import broadcast signals at certain rates. In other words, the proponents argue that cable operators have a government-given right to retransmit and air broadcast signals, and TVRO owners should be able to do likewise with cable programming delivered via satellite.

This analogy has basic defects. Broadcast signals are shown for free, without restriction. The local broadcaster has no intent to control its signal. In fact, because it is advertiser driven, the larger the audience the better. In contrast, cable programming delivered via satellite is a wholesale product for use by cable systems. There is a definite intent in this case to limit the audience. The more appropriate analogy would be to television network signals sent for use by affiliates or other efforts to wholesale programming. It is important to note that in the case of television network signals, this legislation does not provide for a right of access.

A second concern with the provision of a right of access is that it applies to programming delivered for use by cable systems and not to programming sent via satellite for other uses. The sole exception to this policy is for public broadcasting and that is based on its government support. The authors' rationale for not applying this policy to television network programming is the need to protect local television affiliates. However, this bill does not provide people living outside of local affiliates' broadcast areas with a right of access to television network programming. It only requires the FCC to look into this matter. As for all other current and potential uses of satellites to deliver programming, the bill is silent. But what happens if the movie industry decides to send its films via satellite rather than ship copies to each theater? What about new technologies, such as direct broadcast satellites, and their programming?

The authors' limited and somewhat arbitrary viewpoint in determining what programming TVRO owners should have a right to view leads to a fundamental problem with this bill. Just because a signal goes via satellite, the authors permit a right of access. However, what if programmers choose to send their product via microwave or optic fiber cable? Should we give people a right to access these signals too? At one time, programming was sent by these media, and there are plans to resurrect them. The Bell Telephone Companies are now considering an optic fiber system and may have it in place in 2 years. Where will TVRO owners be in such an event?

To construct policy based on the type of transmission media used makes little sense. Voice, data, and even video transmission sent through telephone circuits may go by landlines, terrestrial microwave routes, or satellites; yet, we have never constructed a different right of access policy for these transmissions depending upon the medium used. While some may argue that telephone transmissions are intended to be private, this misses the point. After all, cable programmers could then use the telephone circuits—even over satellites—and the right of access policy would not apply.

This legislation rests on a distinction without a difference. It bases its policy of a right of access on a transient market phenomena—that is, cable programmers' predominant use of satellite delivery—and not on what makes most sense over time. In doing so, it skews the marketplace by providing an incentive for cable programmers, and only these programmers, to use other transmission media.

RIGHT TO BECOME A DISTRIBUTOR

The heart of S. 889 is the so-called third party distribution provision. This provision requires programmers who distribute through a second party to establish reasonable criteria for all other persons (third parties) to become distributors and not to discriminate between distributors. The rationale for this provision is that no cable programmer currently uses a non-cable related distributor and that this results in higher prices and a lack of program packages. The authors believe that by forcing programmers to employ new distributors, these problems will evaporate.

As stated earlier, there is a basic problem with the evidence used to support this provision. Just because programmers distribute either themselves or only through cable operators does not mean that a competitive marketplace does not exist. The evidence, in fact, is to the contrary.

Program packages are available, and the prices paid by TVRO owners are the same as, if not less than, those paid by cable subscribers. For example, the average monthly price paid by cable subscribers for a premium movie service is $10.31. A TVRO owner paying an annual fee can obtain this type of service for $9.72/month (HBO). If the TVRO owner does not wish to pay annually and chooses two premium movie services (HBO and Cinemax), the price is $19.95/month or $9.98/month/service. If a TVRO owner wishes to subscribe to basic cable programming services, a package of 10 services can be purchased for $10.95/month, 14 percent less than the average monthly price paid by cable subscribers.

It should be noted that cable subscribers must first subscribe to basic services before being able to buy premium services. TVRO owners face no such requirement. In addition, there are over 75 program signals that are unscrambled and that TVRO owners can receive free of charge.

As for programming packages, they are available from a number of sources, including HBO, Showtime, Netlink USA, Skycable, and Rural TV. (Advertisements for some of these packages are included at the end of my views.) Thus, there is no evidence that TVRO owners do not have program choices or pay a higher price. The evidence presented by the bill's authors that cable programmers and cable operators continue to control the offering of these services is not only not surprising—it is an accepted business practice—but also of circumstantial merit. There is no hard evidence that anticompetitive practices have occurred. Under the antitrust laws, such practices are not per se violations, and evidence of harm must be produced. A similar burden should lie here. To impose the drastic remedy employed in S. 889 is simply not warranted.

In addition to lacking support, the third party distributor provision will result in numerous problems. First, it will foster endless litigation. Imagine a person seeking to become a distributor being rejected because the programmer claims to already have a reasonable number of distributors or because the programmer is unsure of the person's financial or character qualifications. Court is an obvious next stop, particularly in light of the liquidated damages provision of up to $500,000. To determine what are "reasonable financial and character criteria" and what is "discrimination" will take many years and many lawsuits. It is likely that these matters will still be unsettled when the provision terminates in five years. We all know that the laws we enact end up in court from time to time, but to create laws that are so prone to court challenge is something we should avoid. It demonstrates that the law is vague and the remedy uncertain.

Second, while the objective of the authors is to create new program packages, the result may likely be just the opposite. Rather than permitting their programming to be used in packages where they lack control, programmers may decide to sell only directly. Packagers with whom programmers may want to deal will then be unable to market this programming. While some might argue that programmers will not take this route, the decision for a programmer to market directly is not a remote possibility. Many do so today.

Finally, the authors want to create competition to distribution by cable operators, but the third party provision will, in fact, strengthen the hand of cable operators who want to become distributors of certain programming. While cable operators now distribute some programming to the TVRO market, programmers have the ability to withhold their product. With S. 889, programmers will lose this ability. Moreover, since cable operators are now distributing programming to the TVRO market, they will have a headstart over new distributors. This advantage coupled with the financial resources of certain large cable operators may well result in these operators dominating the TVRO market, which runs counter to the intent of the third party provision.

It is clear from these problems that the third party distributor provision has fundamental flaws. The authors seem to admit their approach has problems and have included in this legislation an investigation by the Federal Trade Commission on the very matter on which we are legislating. We agree that an investigation by an expert agency is the proper route. We can then know whether there is a genuine problem.

CONCLUSION

There may come a day when we need to legislate in the area of TVRO's. We supported the Congress's efforts to do so in the Cable Telecommunications Act of 1984. We would again support Congressional intervention if, for instance, there was greater proof of anticompetitive conduct. That, however, is not the case here. We are moving forward based not on what exists but on what some claim exist. Such a foundation cannot long endure.

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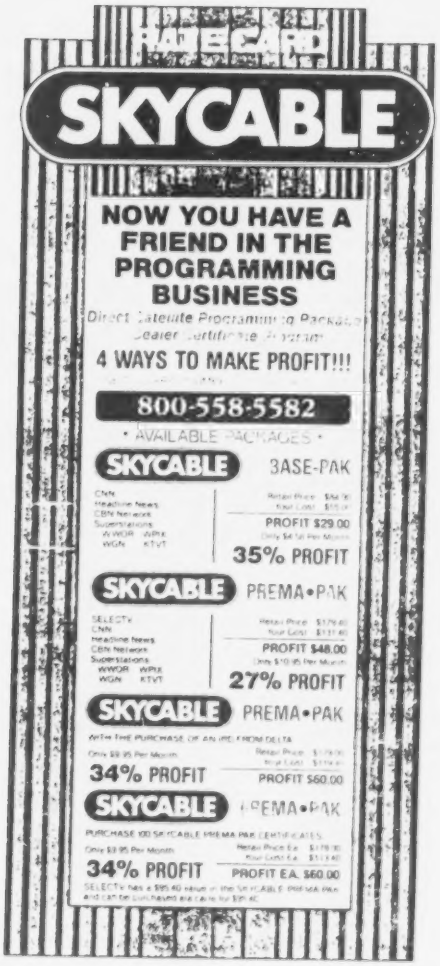
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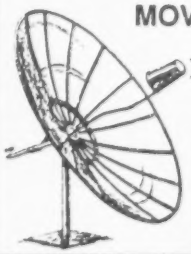

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Calendar No. 517

100TH CONGRESS *1st Session*	SENATE	REPORT 100-273

CONSUMER PRODUCT SAFETY COMMISSION AUTHORIZATION ACT OF 1987

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1882

DECEMBER 21 (legislative day, DECEMBER 15), 1987.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
19-010 WASHINGTON : 1987

S263-35

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Calendar No. 517

100TH CONGRESS
1st Session

SENATE

REPORT
100-273

CONSUMER PRODUCT SAFETY COMMISSION AUTHORIZATION ACT OF 1987

DECEMBER 21 (legislative day, DECEMBER 15), 1987.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1882]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1882) to authorize appropriations for the Consumer Product Safety Commission, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

This legislation amends the Consumer Product Safety Act (CPSA) to authorize appropriations for fiscal years 1988, 1989, and 1990 for the purpose of carrying out various Consumer Product Safety Commission (CPSC) programs. The legislation would also amend the CPSA regarding voluntary standards, rulemaking, and administrative matters.

BACKGROUND AND NEED

The CPSC administers four major statutes: the CPSA (15 U.S.C. 2051 et seq.); the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261 et seq.); the Poison Prevention Packaging Act (PPA) (15 U.S.C. 1471 et seq.); and the Flammable Fabrics Act (FFA) (15 U.S.C. 1191 et seq.). These statutes direct the CPSC to establish safety standards, mandate compliance, undertake safety research, order recalls, provide consumers with information, and otherwise undertake activities to protect American consumers.

Legislation to reauthorize the CPSC has not been enacted since 1981. Since the authorization expired, funds for activities of the

CPSC have been continued through appropriations acts, although the Committee has reported legislation during each intervening Congress to authorize such appropriations.

The CPSC in recent years has been troubled by internal disagreement, which has led to reduced effectiveness in fulfilling its mandate. The compliance and enforcement activities of the CPSC have not been vigorously undertaken, and this failure to act aggressively has communicated the impression that product safety is not of primary national importance. American consumers and businesses alike are less able to anticipate what will be the CPSC's initiatives and responses to product safety matters; this uncertainty has meant that consumers rely less on the safety of products, and manufacturers of products are not certain what is expected to them.

Testimony presented to the Committee indicates that the difficulties and uncertainties currently appear to involve four major areas of CPSC activities: administrative matters; rulemaking delays; voluntary standards activities; and, perhaps symptomatic of other difficulties, the urgently serious problems involving all-terrain vehicles (ATVs).

The CPSA provides that the CPSC shall consist of five commissioners, of whom three constitute a quorum. Due to limitations imposed in the appropriations process, the CPSC currently consists of three commissioners, who continue to be bound by the quorum requirement in the CPSA. In combination with the appropriations limitations, this requirement has resulted in the CPSC being unable to conduct business on certain occasions, thereby impeding the CPSC's functions.

Testimony presented at the hearing held by the Consumer Subcommittee indicates that the average time for promulgation of a final rule by the CPSC is 4 to 5 years. During this process, the CPSC is receiving comments from interested parties about the proposed rule, but no final mandatory standard has been adopted to protect the public.

In addition, the CPSA requires that the CPSC defer to voluntary standards in certain circumstances. Suggestions have been made that this requirement has been used to thwart compliance and enforcement activities of the CPSC, which is clearly contrary to congressional intent.

Finally, ATVs have been shown to present serious risks of injury and death to consumers. The CPSC has begun activity with regard to ATVs, but this activity to date does not appear to have been adequate.

Legislative History

On May 13, 1987, the Commerce Committee conducted an authorization hearing on the CPSC. On November 19, 1987, Senator Gore and others introduced S. 1882. S. 1882 was considered on November 1987, by the Committee in open executive session and ordered to be reported without objection.

Summary of Major Provisions

S. 1882 as reported, authorizes appropriations of $37,700,000 for fiscal year 1988, $37 million for fiscal year 1989, and $38,300,000 for

fiscal year 1989. The bill provides for a quorum of two members at any time during fiscal year 1988, 1989, or 1990 during which there are two vacancies in the membership of the CPSC, and requires that major department heads at the CPSC be appointed and removed by action of the full CPSC. The bill permits a petition to be filed alleging that a voluntary standard is not adequate to address a risk of injury or is developing too slowly; requires that the CPSC permit comments prior to deferral to a voluntary standard; and requires that voluntary standards exist prior to deferral by the CPSC under section 9 of the CPSA. The bill establishes time limits for the conclusion of rulemaking proceedings. Also, the bill requires the CPSC and ATV manufacturers to undertake discussions for the purpose of resulting the safety issues associated with ATVs, and provides that an action be filed under section 12 of the CPSA if those discussion do not result in an agreement on actions regarding ATVs. The bill requires the CPSC to remove the exemption permitting lawn darts to be sold, unless such darts are found not to present the potential for puncture wound injury. The bill requires the CPSC to review its activities regarding standards for toys containing small parts, indoor air pollutants, and sleepwear flammability standards. Finally, the bill repeals several outdated rules.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, December 17, 1987.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1882, the Consumer Product Safety Commission Authorization Act of 1987, as ordered reported by the Senate Committee on Commerce, Science and Transportation on November 19, 1987.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

Edward M. Gramlich,
Acting Director.

Congressional Budget Office Cost Estimate

1. Bill number: S. 1882.

2. Bill title: Consumer Product Safety Commission Authorization Act of 1987.

3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation on November 19, 1987.

4. Bill purpose: To authorize appropriations for the Consumer Product Safety Commission, and for other purposes.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1988	1989	1990	1991	1992
CPSC:					
Authorization level stated in bill	37.7	37.0	38.3		
Estimated authorization: pay increases	0.5	1.6	2.9		
Estimated authorization: FERS increases	1.0	1.2	1.3		
Total estimated authorization level	39.2	39.8	42.5		
Total estimated outlays	33.3	39.7	42.1	6.4	

The cost of this bill would fall within budget function 550.

Basis of estimate.—The authorization level for the Consumer Product Safety Commission (CPSC) is stated in the bill. In addition, the bill would provide such sums as may be necessary for increases in pay and retirement costs. These authorization levels have been estimated by CBO. Increased costs for pay include pay raises and within-grade increases. Costs are based on CBO assumptions for general schedule (GS) salary increases. GS pay increases are estimated to be 2 percent beginning in January 1988, 4.8 percent in October 1989 and 5.2 in October 1990. Estimated pay costs in each year reflect the increase over the fiscal year 1987 level.

Committee staff has told CBO that the authorization of appropriations for increases in "retirement benefits" is intended to cover increases in CPSC's costs resulting from full implementation of the Federal Employees' Retirement System (FERS). Estimated agency costs for retirement are based on information provided by the CPSC. Estimated retirement costs in each year reflect the increase over fiscal year 1987 retirement costs.

All authorized amounts are assumed to be fully appropriated at the beginning of each fiscal year. Outlays are estimated using spendout rates calculated by CBO on the basis of recent program data.

6. Estimated cost to State and local government: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carmela Dyer.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of this legislation.

NUMBER OF PERSONS COVERED

The Committee anticipates that enactment of S. 1882 may result in some increased level of regulation, but does not believe that this increase will be significant. The bill requires that the CPSC conclude its rulemaking on ATVs within 1 year; therefore some additional regulation may result. The bill also eliminates the applica-

bility of the exemption rule regarding lawn darts. The bill also repeals outdated rules regarding cellulose and swimming pool slides.

ECONOMIC IMPACT

The authorization levels included in the bill for the CPSC are to provide for the continuation of CPSC activities at current levels and will have no significant budgetary impact. ATV manufacturers may incur additional costs in manufacturing and marketing ATVs through the rulemaking required to be completed under section 13 of the bill. Manufacturers of lawn darts will no longer be able to market such darts to adults, and this will have an economic impact on these persons.

PRIVACY

The Committee expects that S. 1882 will have no adverse impact on the personal privacy of the individuals affected.

PAPERWORK

S. 1882 does not impose additional reporting requirements on the CPSC or others. Manufacturers of ATVs may incur additional paperwork as a result of the rulemaking required under section 13 of the bill. However, the Committee anticipates that any such additional requirements will not be burdensome.

SECTION-BY-SECTION ANALYSIS

SECTION 1—SHORT TITLE

This section states the short title of the bill, the "Consumer Product Safety Commission Authorization Act of 1987".

SECTION 2—QUALIFICATIONS OF MEMBERS OF THE COMMISSION; QUORUM

Subsection (a) of this section adds a requirement that, in making appointments to the CPSC, the President shall consider individuals with proven consumer product safety backgrounds. Testimony presented to the Committee stressed the importance of appointing individuals to the CPSC who are knowledgeable in the issues involved in consumer product safety. The Committee does not intend to suggest, however, that other experience is not also relevant. Indeed, a CPSC composed of members with widely diverse backgrounds is consistent with the concept of a collegial body.

Subsection (b) of this section provides that, during fiscal years 1988, 1989, and 1990, two members of the CPSC constitute a quorum if at any time there are only three commissioners. The CPSA requires three commissioners for a quorum. Since there are currently only three commissioners (due to limitations imposed by the appropriations process), this quorum requirement makes it difficult for the CPSC to function. Two members of the CPSC testified that the quorum requirement and absences last year prevented the CPSC from meeting to resolve certain issues for over 6 months. The CPSA envisioned that a majority of the members would constitute a quorum, and subsection (b) continues that intent in light of the current appropriations limitation at the CPSC. The Committee con-

tinues to believe that the collegial structure of hte CPSC yields beneficial results, since differing points of view can be exchanged and a final outcome derived through consensus activity. The Committee adopted an amendment in executive session intended to clarify that subsection (b) of this section does not either limit or expand any authority specified in section 4(f)(1) of the CPSA, including the executive and administrative functions of the Chairman.

SECTION 3—APPOINTMENT OF CERTAIN PERSONNEL

Subsection (a) of this section amends section 4(g)(1) of the CPSA to require that top-level personnel at the CPSC (other than in each member's office) are to be appointed by the Chairman with the concurrence of the other members of the CPSC. Currently, only certain of these individuals are so appointed, and this amendment will reaffirm that all top-level employees are responsible to the full CPSC.

Also, the subsection provides that no such individuals may be removed from their positions except by action of the full CPSC. This provision parallels the appointment process.

Finally, the subsection requires that the head of the Office of Compliance and Enforcement within the CPSC be an attorney, as is currently the case. As that Office is responsible for ensuring compliance with the CPSA and standards adopted pursuant to the CPSA and for recommending action when persons fail to meet such responsibilities, the Committee believes that it is desirable for the head of that Office to possess the legal training necessary to make informed decisions on compliance and enforcement matters. The recent reassignment of the head of the Office of Compliance, an individual with a long history of service to the CPSC, and his replacement with an individual who is not an attorney, brought to the Committee's attention the issue of having an individual with appropriate qualifications responsible for supervising the attorneys in this Office.

Subsection (b) of this section specifies that no individual may be appointed to certain top-level positions at the CPSC (other than in each member's office) on an acting basis for a period in excess of 90 days, unless the acting appointment is approved by the CPSC. This should ensure that the Chairman may make acting appointments to respond to exigent circumstances, but also afford the full CPSC with the opportunity to act on appointments to major positions.

SECTION 4—PRIORITIES

This section adds a new subsection (j) to section 4 of the CPSA to require the CPSC to establish an agenda for its actions during each year, and to prioritize such actions. In establishing the agenda, the CPSC must hold a public hearing and offer interested parties the opportunity to comment. Currently, the CPSC establishes such an agenda, and this provision merely codifies this existing practice.

SECTION 5—PETITION REGARDING VOLUNTARY STANDARDS

Subsection (a) of this section adds a new subsection (d) to section 7 of the CPSA to permit a consumer (or survivor of a consumer)

injured by a product, a national organization representing consumer interests, or a State or local consumer official to file a petition with the CPSC alleging that the development of a voluntary product safety standard is proceeding too slowly, or that a particular voluntary standard is inadequate to address the risk of injury associated with a product. The CPSC may hold a hearing regarding the petition, if the CPSC determines that such a hearing is appropriate. Such a petition may only be filed with respect to a consumer product for which a petition has previously been filed under title 5, United States Code, in order to permit the CPSC to have received information regarding the risks. The CPSC is to act on the petition within 120 days after it is filed, and may extend this period for not more than 60 days for good cause. The CPSC shall state the reasons for its approval or denial. The Committee anticipates that the CPSC will make public in an appropriate manner the reasons for its action. The subsection also permits the CPSC to aggregate similar petitions which involve the same product and state the same basis for the petition. The party filing the petition may seek judicial review of the CPSC's decision, in accordance with applicable provisions of title 5, United States Code.

The Committee has consistently received testimony and comments regarding the voluntary standards process since the provisions were enacted in 1981. Though the Committee did not desire to reenact section 10 of the CPSA as it existed before the 1981 amendments, the Committee is aware that the CPSC at times has not been responsive to concerns that voluntary standards development has been inadequate or too slow. In fact, it has been suggested that the CPSC may seek to utilize the deferral to voluntary standards required under section 9 of the CPSA to justify inaction or delay with regard to product risks. This is clearly contrary to the intent of the 1981 amendments. The Committee believes that the development of voluntary standards should proceed as expeditiously as possible, with aggressive development of standards adequate to address risks of injury. This provision should ensure that certain interested parties are able to raise their objections to the CPSC, without creating a situation where the CPSC will be besieged with requests for review of voluntary standards.

The term "national consumer organization", as used in this provision, is intended to encompass organizations which speak for or on behalf of matters of importance to consumers. The term should not be interpreted as being restricted to those organizations which are commonly considered "consumer organizations" at the national level, so as to exclude other groups which might have a legitimate reason to utilize the petition process under this provision.

Subsections (b) and (c) of this section make identical amendments to the FHSA and FFA, respectively.

SECTION 6—TIME LIMITATIONS FOR PROPOSED RULES

This section amends section 9(c) of the CPSA to require the CPSC to issue a proposed consumer product safety rule within 12 months after an advance notice of proposed rulemaking (ANPR) for such a rule has been issued, unless the CPSC determines the rule is not likely to eliminate or reduce the risk of injury from the product.

The CPSC may extend this time for not to exceed 180 days for good cause.

Currently, the only time limitation on rulemaking is that a "reasonable" time is permitted. The Chairman of the CPSC testified before the Consumer Subcommittee this year that the average time for development of a mandatory standard by the CPSC is four and one-half years. This time period seems to the Committee to be excessive, and the Committee expects that the CPSC can streamline its procedures in order to ensure that rulemakings are conducted expeditiously, but without sacrificing the thorough review that is necessary in any rulemaking proceeding. This section does permit an extension of the 12-month period for good cause, but the Committee does not intend that this extension authority will be utilized so often as to become the norm, rather than the exception.

SECTION 7—VOLUNTARY CONSUMER PRODUCT SAFETY STANDARDS

In 1981, the CPSA was amended to require that the CPSC defer to a voluntary standard where the CPSC determines that a voluntary standard 9(a)(6) of the CPSA is likely to result in the elimination or adequate reduction of the risk of injury and it is likely that there will be substantial compliance with such standard. This invitation is initiated by the publication of an ANPR. The Committee reaffirms its belief that voluntary safety standards can play an important role in protecting consumers. CPSC deference to voluntary standards permits the CPSC to save scarce resources and can permit safety problems to be addressed in a more expeditious manner than might otherwise occur, thereby saving lives and preventing injuries. Such deferral authority, however, was not intended to become an excuse for inaction or delay on the part of the CPSC, including delay in issuing ANPRs where such issuance is appropriate.

Subsection (a) of this section amends section 9(b)(2) of the CPSA to require that the CPSC defer under section 9 of the CPSA to a voluntary standard only where the voluntary standard exists. The Committee understands that the 1981 amendment to section 9 anticipated that persons would submit to the CPSC their intentions and a plan to modify or develop a voluntary standard. Recently, however, suggestions have been made that the mere promise to submit such standard, or a "hope" by the CPSC that such a standard may be developed, may be a sufficient basis for deferral under section 9(b). To clarify the original intent of the 1981 amendments, S. 1882 includes language requiring that the standard actually be in existence before deferral under section 9(b) may occur.

Subsection (b) amends section 7(b) of the CPSA to require that the CPSC afford interested persons the opportunity to comment regarding any voluntary standard prior to CPSC deferral. When the CPSA was amended in 1981, the conference report discussed the adoption of voluntary standards in the sense that they were finally approved in accordance with reasonable procedures, such as those utilized by groups that develop national consensus standards. It is the Committee's belief that participation by affected individuals as early as possible in the development of a voluntary standard will yield the best results. The requirement in the bill as reported that

an opportunity to comment be afforded prior to deferral is consistent with that earlier intention, and reaffirms the Committee's intent that participation by interested and affected parties occur during the development of voluntary standards.

Subsection (c) amends the CPSA, the FHSA, and the FFA to require that the CPSC establish a system for monitoring compliance with voluntary standards in order to ensure that industry is following the voluntary guidelines. In order to guarantee the integrity of the voluntary standards process under these Acts, the Committee believes that it is imperative for the CPSC to monitor voluntary standards. Absent such oversight, adherence to these standards might diminish, resulting in unnecessary risks to consumers. The Committee intends that the system established by the CPSC under this amendment provide for CPSC review of all voluntary standards on a regular basis.

SECTION 8—DISCLOSURE TO CONTRACTORS

This section amends section 6(a)(8) of the CPSA (15 U.S.C. 2055(a)(8)). Subsections (a)(2) through (a)(6) of section 6 of the CPSA provide substantive and procedural protections for trade secrets and certain other confidential business information reported to or otherwise obtained by the CPSC. Under section 6(a)(2), such business information shall be considered confidential and shall not be disclosed. Subsections (a)(3) through (a)(6) further provide that when a manufacturer or private labeler designates information as confidential, the CPSC (if it determines that the information is not confidential) may not disclose the information until the CPSC has both (1) modified the manufacturer or private labeler of the CPSC's intent to disclose the information, and (2) given the manufactuer or private labeler not less than ten days from the date of receipt of the notification to bring an action in a U.S. district court to restrain disclosure of the information.

Section 6(a)(8) provides that subsections (a)(2) through (a)(6) of section 6 do not prohibit the disclosure of information to "office or employees" of the CPSC. The CPSC has expressed its concern that section 6(a)(8) of the CPSA does not clearly provide that the CPSC may disclose product hazard information, essential to a CPSC contractor's research or investigation, to the contractor.

The Committee expects that section 8 of the reported bill will permit the disclosure of CPSC-held information needed by agency contractors for compliance with their contract. Contractors remain bound by section 6(d)(2) of the CPSA, which requires that contractors comply with the disclosure provisions of section 6 in making any subsequent disclosure of information to the general public.

SECTION 9—CHRONIC HAZARD ADVISORY PANEL

This section amends section 28(b)(1) of the CPSA, which sets forth the membership of chronic hazard advisory panels appointed under the CPSA to advise the CPSC respecting the chronic hazards of cancer, birth defects, and gene mutations associated with consumer products. Section 28(b) of the CPSA contains limitations on the persons who may serve on such advisory panels, and these limitations were intended to preclude individuals who might have some

conflict of interest from providing advice to the CPSC regarding these matters. Paragraph (1) of subsection (b) excludes officers or employees of the United States from service on these panels. However, the Committee is aware that it has been difficult to find qualified individuals to serve on some panels because of these statutory limitations. Therefore, the amendment made by this section would permit Federal employees from the National Institutes of Health, the National Toxicology Program, or the National Center for Toxicological Research to serve on a chronic hazard advisory panel. Enlarging the resource pool from which members of these panels may be selected in this way will provide more expert assistance to the CPSC in evaluating chronic hazards, without creating the potential for conflicts of interest.

SECTION 10—CELLULOSE STANDARD

This section repeals section 35 of the CPSA, relating to the interim cellulose insulation safety standard, and provides that no rules promulgated under that section shall be effective after the date of enactment of this bill. The CPSC has testified that the standard is no longer necessary to ensure the safety of cellulose insulation, and there has been some suggestion that the current standard actually may discourage the development of more effective voluntary standards. The repeal of section 35 of the CPSA by this section would not affect the agency's rules regarding the proper labeling of cellulose insulation to assure proper installation.

SECTION 11—AUTHORIZATION OF APPROPRIATIONS

This section amends section 32(a) of the CPSA to authorize appropriations of $37,700,000 for fiscal year 1988, $37,000,000 for fiscal year 1989, and $38,300,000 for fiscal year 1989. This is consistent with the President's budget request, and the 1988 figure takes into account the one-time adjustment to the Federal retirement system (FERS) required in 1988. In addition, the section provides that increases in pay and retirement benefits are also authorized, to the extent provided by law.

SECTION 12—SWIMMING POOL SLIDE RULE

This section repeals the swimming pool slide standard (16 CFR 1207) issued by the CPSC in 1976. The CPSC has repeatedly stated that the standard is unnecessary, and may in fact impede efforts by industry to develop a better voluntary standard. The Committee believes that development of a voluntary standard in this regard is in the public interest, and anticipates that industry and the CPSC will aggressively work to put such a standard into effect.

SECTION 13—ALL-TERRAIN VEHICLES

ATVs are three- or four-wheeled motorized cycles intended for off-road use. Many units are sold for recreational use, although they also are used in performing occupational chores. ATVs typically have gasoline-powered engines of between 50 and 250 cubic centimeter displacement, and use broad, soft, low-pressure tires.

According to the CPSC, ATVs are associated with an average of 20 deaths and 7,000 injuries each month. The CPSC has made the

ATV issue a priority project (thereby assigning it special consideration) during fiscal years 1985 through 1988. On April 3, 1985, the CPSC approved an action plan to deal with the hazards associated with ATVs. This plan provided for a special task force, consisting of 15 members who represented each of CPSC's directorates and major units. On May 31, 1985, the CPSC issued an ANPR regarding ATVs (50 Fed. Reg. 23139 (May 31, 1985)). On September 30, 1986, the CPSC task force filed its report, consisting of 14,000 pages, setting forth the findings and recommendations of the task force. The enforcement staff also submitted recommendations to the CPSC.

On December 12, 1986, the CPSC voted that there was reason to believe that three-wheel ATVs present an imminent hazard under section 12 of the CPSA. The CPSC voted to bring an action under that section, and agreed (as permitted by the CPSA) to request that the Department of Justice (DOJ) represent the CPSC in this action because of the litigation expertise possessed by DOJ. On December 18, 1986, the CPSC adopted a number of regulatory motions regarding three-wheel ATVs. The CPSC forwarded to DOJ the request for representation in the action under section 12 on February 2, 1987. As of this writing, the DOJ has not formally indicated to the CPSC that it will represent the CPSC in this action.

Under section 27 of the CPSA, the CPSC is authorized to initiate civil actions on its own behalf if the CPSC makes a written request to DOJ for representation in such civil actions and DOJ does not, within 45 days, notify the CPSC that it will provide representation. More than 10 months have passed since DOJ received the request from the CPSC for representation. Despite the lack of a response from DOJ, the CPSC has not initiated a civil action on its own behalf. This unfortunate delay has resulted in more injuries and the loss of more lives. For this reason, the Committee determined that some action regarding ATVs as warranted.

When S. 1882 was introduced, it was anticipated that discussions between the CPSC and ATV manufacturers regarding actions to be taken to advance ATV safety would begin at once, and not await further action either by the Senate or the Congress. The Committee understands that such discussions have been undertaken. Some members of the Committee expressed their views that, if such discussions do not result in agreements regarding satisfactory actions to be taken by ATV manufacturers, or if the CPSC does not otherwise address the issues, some legislative action may be necessary.

Subsection (a) of this section requires that the CPSC begin discussions within 10 days after the date of enactment of this bill with the distributors of ATVs regarding corrective actions to be taken by distributors to reduce the risk of injury and death associated with ATVs.

Subsection (b) of this section specifies that, if agreement is reached within 60 days after enactment of the legislation between the CPSC and ATV distributors, the CPSC shall immediately file an action in a district court of the United States, together with a proposed agreement in settlement of such action.

Subsection (b) also provides that any agreement between the CPSC and distributors must include notification to prior purchasers of the operating characteristics and potential risks of ATVs, labels to be affixed to ATVs, education and training programs at

the distributors' expense, the offering of helmets and other protective equipment, and a prohibition on the sale of three-wheel ATVs and adult-size ATVs intended to be operated by children. The agreement may provide that distributors of ATVs offer refunds or other measures to advance the safety of prior purchasers of ATVs. The court in which the action is filed shall approve the agreement unless it is contrary to the policies and purposes or authority of the CPSC under this section or the CPSA.

If the CPSC and the distributors of ATVs are unable to agree on actions to be taken by distributors under this section within 60 days after enactment of the bill, the CPSC is immediately to file an action under section 12 of the CPSA. The court in which such action is filed is to handle the action on an expedited basis.

Finally, subsection (b) provides that no action under section 12 shall be filed by or on behalf of the CPSC with regard to ATVs during the negotiating time period provided in the bill, unless the CPSC determines after the nogotiations begin that the negotiations will not produce the most expeditious and effective means to reduce the incidence of injury and death associated with ATVs. There had been some concern that this subsection might be construed to discourage the imminent filing of a civil action regarding ATVs under section 12 of the CPSA. This was not the Committee's intent. Rather, the intention was that negotiations under this section should begin at once, and since the Committee was aware on November 19 of no intention to file imminently such an action under section 12, the Committee did not believe that this section could have the effect of delaying the filing of such an action.

Subsection (c) of this section requires the CPSC to promulgate a final rule regarding ATVs within 1 year after the date of enactment. The rule must address uniform user controls, education and training, labels, and performance requirements of ATVs in order to reduce injury and death. Since the CPSC began a rulemaking proceeding regarding ATVs in 1985, the Committee anticipates that the CPSC will have sufficient time to promulgate this rule.

The objective of this section is to achieve the greatest improvement in ATV safety in the shortest period of time. The Committee is convinced that the seriousness of the deaths and injuries associated with ATVs justified prompt, comprehensive attention. After the date on which this legislation was ordered to be reported by the Committee, the Committee understands that the CPSC and manufacturers did indeed begin attempts to resolve these safety issues. The Committee did not desire to legislate any particular remedy in the area of ATV safety, since the CPSC and DOJ have been actively involved in this issue for a period of time. However, the Committee will continue to monitor developments in the area of ATV safety.

SECTION 14—INDOOR AIR POLLUTANTS

This section requires the CPSC to review its activities regarding indoor air pollutants to determine whether additional requirements are necessary and report on such review. The CPSC will evaluate the adequacy of its previous efforts, and determine whether rulemaking is required with regard to any particular pollutants. If the

CPSC determines that rulemaking is necessary, the CPSC is to state the date by which such rulemaking can be completed. In addition, the CPSC is to evaluate what benefits are likely to be derived from such rulemaking. The CPSC is also to provide information on voluntary standards regarding indoor air pollution, the number of CPSC personnel assigned to these matters, information regarding participation by the CPSC in efforts of other Federal departments and agencies with respect to indoor air pollution, and any materials prepared by the CPSC to assist consumers in understanding the risks of indoor air pollutants.

The CPSC has considered issues relating to indoor air pollution since at least 1974, and has identified indoor air pollution as a priority project for fiscal year 1989. In fiscal years 1986 and 1987, conference reports regarding appropriations for the CPSC have set aside funds for indoor air pollution research. Indoor air pollution has become a growing concern in the past decade as Americans, in response to the energy crisis, increasingly have sealed up their homes. As the exchange of polluted indoor air for possibly cleaner outdoor air has diminished, the potential for exposure to indoor air pollutants has increased. Potential adverse health effects from indoor air pollution range from short-term discomfort (eye and throat irritation, for example) to long-term effect (including respiratory ailments and other organic disease).

Some of the pollutants which have been considered by the CPSC include formaldehyde, asbestos, methylene chloride, and combustion by-products. The CPSC has indicated to the Committee that it will, during fiscal year 1988, evaluate data from studies funded in previous years, develop recommendations for remedial action, and conduct additional laboratory chamber studies of consumer products to determine effective strategies for reducing consumer exposure to indoor air pollutants

The report required by this section is to be submitted to the Congress within 1 year after the date of enactment of this legislation.

SECTION 15—SLEEPWEAR FLAMMABILITY STUDY

This section requires the CPSC to evaluate its activities to determine whether additional action is necessary regarding sleepwear flammability, in order to reduce apparel-related deaths among adults. As part of these activities, the CPSC shall conduct a study under section 14 of the FFA to determine whether a flammability standard applicable to all sleepwear is necessary. In particular, the CPSC is to consider the risks presented to the elderly from flammable sleepwear, and the benefits, if any, from further action by the CPSC. The results of this study are to be reported to the Congress within 1 year after the date of enactment of this legislation.

The CPSC has long been involved with issues regarding flammable fabrics. In February 1986, under a contract with the CPSC, the TriData Corporation submitted the results of a study regarding apparel fires ("Wearing Apparel Fires: Analysis of In-Depth Investigations from 1972-1984", February 1986). That study indicated that, in the years since the Flammable Fabrics Act of 1953, children's deaths from wearing apparel fires have dropped dramatically—by over 90 percent, according to data of the National Center for

Health Statistics (NCHS). That study also referred to NCHS data which shows that apparel deaths for all age groups have dropped significantly. In the years 1970–72, fire deaths from apparel fires dropped from 760 to 542 (a reduction of 29 percent). In the next 2 years, they dropped to 437 (a reduction of 19 percent). Fire deaths from apparel have continued to decline in the last decade. In 1982, the number of such deaths was 260 (a 40 percent reduction from 1976). Young children's deaths from apparel fires, according to the TriData report, have been almost totally eliminated. That study also found that the elderly are more susceptible to succumbing to apparel fires once injured. The study recommended that the level of attention given to apparel fires should be raised; that the CPSC should continue to work with manufacturers and sellers of nightwear to reduce the special problems of the elderly; that the results of the study should be made available for educational purposes to fire prevention and consumer protection organizations; and that the CPSC should continue its investiation of apparel fires.

The CPSC has promulgated a flammability standard applicable to children's sleepwear sizes 0 to 14, and has issued a set of definitions regarding what qualifies as children's sleepwear. Evidence suggests that there has been a reduction in the number of children's deaths since the adoption of the children's sleepwear standard.

The standard adopted by the CPSC in practical terms means that garments made of 100 percent cotton do not satisfy the standard. It appears that some manufacturers, primarily offshore manufacturers, have attempted to evade the standards by producing garments which are for all practical purposes sleepwear but which vary in some small way from the standard. These products are often made from cotton and displayed near complying sleepwear. Consumers then purchase these garments and do not have the protection afforded by the flammability standard. In addition, since consumers may prefer the garment made from cotton, these non-complying garments then have a competitive advantage over those products which comply with the standard. The CPSC has a policy statement that encourages retailers to segregate garments that comply with the standard from those that do not comply, but that policy statement is often not followed. The Committee encourages the CPSC to investigate ways to ensure further adherence to that policy statement.

It is not the intention of the Committee in this section to alter the children's sleepwear standard or the definitions adopted by the CPSC in that standard, or to suggest that amendment to the standard is necessary or desirable. Rather, the Committee believes that it is appropriate for the CPSC to review its activities in this area, particularly because the elderly may be susceptible to injury and death from apparel-related fires.

SECTION 16—PRODUCTS CONTAINING SMALL PARTS

This section requires the CPSC to review its activities regarding the sale for use by children under 3 years of age of toys and articles containing small parts which present a choking, aspiration, or ingestion hazard. The CPSC is to consider the adequacy of the di-

ameter, length, and shape requirements of the test cylinder currently used by the CPSC. The results of the study are to be reported within 9 months after the date of enactment of this legislation.

Current regulations classify as a banned hazardous substance any toy or other article intended to be used by children under the age of 3 which presents a choking, aspiration, or ingestion hazard (16 CFR 1500.18(a)(9)). the method utilized by the CPSC to test products for such hazards is a truncated cylinder with a 1.25 inch diameter and a depth ranging from 1 to 2.25 inches. Any article intended for children under 3 years of age which is small enough to fit entirely within the cylinder does not satisfy the test standard, and its sale is prohibited. The American Academy of Pediatrics has expressed its interest regarding this issue.

In November 1983, the CPSC staff performed a human factors analysis of 195 choking incidents associated with products such as squeeze toys, rattles, pacifiers, and other toys. This study looked at both product and human characteristics associated with choking incidents. Information prepared by the staff of the CPSC in October 1986 indicated that the CPSC received reports of 22 toy-related deaths in 1985, of which 18 involved the ingestion and aspiration of balloons, small toys (such as balls and marbles), or parts of toys. In addition, during fiscal year 1986, the information showed that the CPSC received almost 800 consumer complaints regarding toys, of which 189 were said to be associated with ingestion or aspiration hazards. Manufacturers of children's toys note that many of the incidents cited in this report which relate to products intended for children under 3 years of age are already addressed by a voluntary standard for toys, and that this standard has been amended at the recommendation of the staff of the CPSC.

On April 20, 1987, a petition was filed with the CPSC on behalf of the Consumer Federation of America and the Attorney General of the State of New York to require that the size of the small parts test cylinder be enlarged. Specifically, the petition requested that a reexamination of the diameter of the test cylinder be undertaken. It is the Committee's understanding that efforts in response to the petition are underway at the CPSC.

Section 16 of the bill as reported permits the CPSC to utilize available data, but also requires the CPSC to develop additional information. The CPSC is to invite interested persons to submit written comments regarding the necessity, if any, for amending such regulations, and expects that consumers and manufacturers will be afforded ample opportunity to present their opinions.

It is not the intent of the Committee in this section to require that the test methodology be amended by the CPSC, nor that this provision impact on any activity regarding small parts in toys that may be underway at the CPSC. Rather, because of the CPSC's data and the petition filed with the CPSC, the provision is intended to provide information to the Committee regarding the CPSC's activities in this area. The CPSC has in effect a number of regulations affecting toys (for example, an electrical/thermal toy regulation (16 CFR 1505); a rattle regulation (16 CFR 1510); a pacifier regulation (16 CFR 1511); a bicycle regulation (16 CFR 1512); a lead-containing paint regulation (16 CFR 1403); and requirements for sharp points and edges (16 CFR 1500.48 and 49)). Efforts by the CPSC to oversee

the safety of articles intended for use by children are necessary and desirable.

SECTION 17—LAWN DARTS

This section requires the CPSC, not later than 60 days after the date of enactment of the legislation, to amend its regulations to revoke the current exemption which permits lawn darts and other similar sharp-pointed toys to be sold for adult use (16 CFR 1500.86(a)(3)), unless the CPSC finds that such products do not have the potential for causing puncture wound injury.

Before the establishment of the CPSC, the Food and Drug Administration (FDA) was responsible for administering the FHSA. Pursuant to authority contained in the FHSA, as amended by the Child Protection and Toy Safety Act of 1969 (83 Stat. 187), the FDA on December 19, 1970 issued a final rule stating that lawn darts and other similar sharp-pointed toys usually intended for outdoor use which had the potential for causing puncture wound or other injury presented a mechanical hazard within the meaning of the FHSA. Therefore, such products were considered banned products within the meaning of the FHSA. However, based on the only comment received during the public notice period of this rulemaking proceeding, the FDA included an exemption for lawn darts. Specifically, this exemption applied to lawn darts and similar sharp-pointed articles which were not intended for toy use, which were marketed solely as a game of skill for adults, and which contained certain warning labels. In addition, warnings and instructions were required to be provided, and the products could not be sold in toy stores or store departments dealing predominantly in toys and other children's articles. (16 CFR 1500.18(a)(4) and 16 CFR 1500.86(a)(3)). The regulation was upheld by a district court of the United States after the filing of a petition for judicial review of the regulation (*R.B. Jarts, Inc.* v. *Richardson,* 438 F.2d 846 (2d Cir. 1971)).

In 1984, the CPSC received and confirmed reports that, contrary to the rule, lawn darts were being sold in toy stores. Products of lawn dart importers were found to contain labeling violations. In July 1985 the CPSC issued a consumer safety alert warning of the hazards in permitting children to play with lawn darts.

In April 1987, a 7-year-old girl from Riverside, CA was struck in the head by a lawn dart and died as a result of this injury. Following this incident, the CPSC staff in June 1987 examined the labeling on lawn darts marketed by 14 firms, and products from all 14 firms were found to have labeling violations. Products of eight of the firms were considered to have serious labeling violations (i.e., no required warning statement on the front panel of the package). In addition, the CPSC staff found during an inspection of a number of stores that lawn darts were being displayed with or in close proximity to toys or sporting goods intended primarily for children—clearly not permitted by the exemption.

In July 1987, the staff of the CPSC met with importers and manufacturers of lawn darts, and suggested five voluntary actions (including labeling modifications to the packages and the products themselves, design changes to prevent modification, information to

retailers regarding display of law darts, and cessation of packaging of lawn darts in combination with other games). In response to these suggestions, some firms indicated that they would comply with all of the suggested voluntary actions; others indicated that they would comply with some of these actions; still others indicated that they would not comply with specific CPSC recommendations.

The CPSC met on October 1, 1987 to consider appropriate actions regarding lawn darts, and decided to issue an ANPR regarding lawn darts. This notice would indicate that the CPSC may either require the voluntary actions previously suggested to the manufacturers, or ban lawn darts. The CPSC staff is to conduct a surveillance program for a period of 3 months to determine industry compliance with the existing regulations and the voluntary actions requested of the manufacturers.

The CPSC staff estimates that, since 1970, at least three children have been killed by injuries associated with lawn darts. Approximately 6,100 injuries from lawn darts were treated in the Nation's hospital emergency rooms between January 1978 and December 1986, an average of 675 injuries per year. Nearly 57 percent of the injuries involved the head, face, eye, or ear; almost 8 percent involved fractures or puncture wounds. Most noticeably, the CPSC staff indicates that approximately 81 percent of the victims of lawn dart injuries were under the age of 15, and that 50 percent were under the age of 10. According to the CPSC staff, the majority of the reports for which information was available about the user of lawn darts shows that children were playing with the lawn darts, despite the ban and exemption which were developed to keep the product out of the hands of children.

The Committee approved the requirement that the current exemptions regarding lawn darts be rescinded because the evidence available to the Committee suggests that the exemption is not fulfilling its purpose—namely, preventing children from using lawn darts. Also, the Committee was cognizant of the statement by the CPSC in its ANPR that even the additional limitations suggested by the CPSC in July 1987 may be insufficient to keep lawn darts out of the hands of children, since it can be argued that the product has such a strong inherent appeal to children. (Federal Register, October 20, 1987, at 38938.)

The Committee does not intend that its action with regard to lawn darts be viewed as a possible precedent for future activity directed toward specific products. The Committee continues to believe in the mission and expertise of the CPSC despite its recent internal difficulties and lack of aggressive enforcement, and is committed to ensuring that the safety of consumer products is safeguarded. The Committee views its current action regarding lawn darts as distinguishable from other situations in which the CPSC has not yet acted or is in the process of determining the appropriate action to be taken. In the present instance, this product has been the subject of protracted activity by the CPSC, and had already been banned in order to achieve certain safety goals, but a narrow exemption to that ban was permitted. Since it appears that the results of that exemption are contrary to the safety objectives of the ban, the Committee believes that its action in this circumstance is warranted. However, the Committee does not believe that

consumers typically are best served by Congress engaging in product-specific legislative initiatives, but thinks that it is more appropriate and effective for the CPSC to fulfill its statutory responsibilities.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Consumer Product Safety Act

Section 4 of that Act

CONSUMER PRODUCT SAFETY COMMISSION

SEC. 4. (a) An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. *In making such appointments, the President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission.* The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission. An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

(6) through (f) * * *.

[(g)(1) The Chairman, subject to the approval of the Commission, shall appoint an Executive Director, a General Counsel, a Director of Engineering Sciences, a Director of Epidemiology, and a Director of Information. No individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS–18 of the General Schedule.]

(g)(1) The Chairman, subject to the approval of the Commission, shall appoint an Executive Director, a General Counsel, an Associate Executive Director for Engineering Sciences, an Associate Executive Director for Epidemiology, an Associate Executive Director for Compliance and Administrative Litigation, an Associate Executive Director for Health Sciences, an Associate Executive Director for Economic Analysis, an Associate Executive Director for Field Operations, a Director for Office of Program, Management, and Budget, and a Director for Office of Information and Public Affairs. Any other individual appointed to a position designated as an Associate Executive Director shall be appointed by the Chairman, subject to the approval of the Commission. The Chairman may remove an individual from any position specified in paragraph (1) of this subsection only with the approval of the Commission. The Chairman may appoint only an individual who is an attorney as the Associate Ex-

ecutive Director for Compliance and Administrative Litigation. No individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS–18 of the General Schedule.

(2) through (4) * * *.

(5) No individual may be appointed on an acting basis to any position specified in paragraph (1) of this subsection for a period in excess of 90 days unless such appointment is approved by the Commission.

(i) * * *.

(j) At least 30 days before the beginning of each fiscal year, the Commission shall establish an agenda for Commission actions pursuant to the Acts under its jurisdiction and, to the extent feasible, shall establish priorities for such actions. Before establishing such agenda and priorities, the Commission shall conduct a public hearing on the agenda and priorities and shall provide reasonable opportunity for the submission of comments.

Section 6 of that Act

PUBLIC DISCLOSURE OF INFORMATION

SEC. 6. (a)(1) * * *.

(2) through (7) * * *.

(8) The provisions of paragraphs (2) through (6) shall not prohibit the disclosure of information to other [officers or employees] *officers, employees, or representatives of the Commission (including contractors)* concerned with carrying out this Act or when relevant in any administrative proceeding under this Act, or in judicial proceedings to which the Commission is a party. Any disclosure of relevant information in Commission administrative proceedings, or in judicial proceedings to which the Commission is a party, shall be governed by the rules of the Commission (including in camera review rules for confidential material) for such proceedings or by court rules or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

(b) through (d) * * *.

Section 7 of that Act

CONSUMER PRODUCT SAFETY STANDARDS

SEC. 7. (a) * * *.

(b)*(1)* The Commission shall rely upon voluntary consumer product safety standards rather than promulgate a consumer product safety standard prescribing requirements described in subsection (a) whenever compliance with such voluntary standards would eliminate or adquately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards.

Prior to relying upon any voluntary consumer product safety standard, the Commission shall afford interested persons (including manufacturers, consumers, and consumer organizations) who were not involved in the development of such standard a reasonable opportunity to submit written comments regarding such standard. The Commission shall consider such comments in making any determi-

nation regarding reliance on the involved voluntary standard under this subsection.

(2) The Commission shall devise procedures to monitor compliance with any voluntary standards—

(A) upon which the Commission has relied under paragraph (1) of this subsection;

(B) which were developed with the participation of the Commission; or

(C) whose development the Commission has monitored.

(c) * * *.

(d)(1) With respect to any consumer product for which a petition has been filed under section 553(e) of title 5, United States Code, any interested party may petition the Commission for review of any voluntary consumer product safety standard. Such party may only file such petition on the basis that—

(A) there is a risk of injury associated with the consumer product, the voluntary standard is intended to address such risk of injury, and the voluntary standard is inadequate to address such risk of injury; or

(B) the development of the voluntary standard is not proceeding in a timely manner.

(2) The Commission may hold a hearing on any petition filed under this subsection. The Commission shall approve or deny such petition within 120 days after it is filed, except that the Commission may extend such time period for not to exceed 60 days for good cause. The Commission shall file notice of such petition and any extension of such time period in the Federal Register. If the Commission approves such petition, it shall specify the action which the Commission will take in response to the petition. If the Commission denies such petition, it shall state the resons for such denial. Any approval or denial of such a petition shall be considered final agency action for purposes of judicial review.

(3) The Commission may consider together any petitions filed under this subsection if such petitions concern the same consumer product and state the same basis for the petition under paragraph (1) of this subsection.

(4) As used in this subsection, the term "interested party" means—

(A) any consumer who is injured by a consumer product with respect to which a voluntary standard is in the process of development;

(B) the survivor of any consumer specified in subparagraph (A) of this paragraph;

(C) a national organization representing consumer interest; or

(D) an official of a State or local government with responsibility for the safety of consumer products.

Section 9 of that Act

ADMINISTRATIVE PROCEDURE APPLICABLE TO PROMULGATION OF CONSUMER PRODUCT SAFETY RULES

SEC. 9. (a) * * *.

(b)(1) * * *.

(2) If the Commission determines that—

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (a)(6) is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard.

the Commission shall terminate any proceeding to promulgate a consumer product safety rule respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury, *except that the Commission shall terminate any such proceeding and rely on a voluntary standard only if such voluntary standard is in existence.*

(c) No consumer product safety rule may be proposed by the Commission unless, not less than 60 days after publication of the notice required in subsection (a), the Commission publishes in the Federal Register the text of the proposed rule, including any alternatives, which the Commission proposes to promulgate, together with a preliminary regulatory analysis containing—

(1) a preliminary description of the potential benefits and potential costs of the proposed rule, including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs;

(2) a discussion of the reasons any standard or portion of a standard submitted to the Commission under subsection (a)(5) was not published by the Commission as the proposed rule or part of the proposed rule;

(3) a discussion of the reasons for the Commission's preliminary determination that efforts proposed under subsection (a)(6) and assisted by the Commission as required by section 5(a)(3) would not, within a reasonable period of time, be likely to result in the development of a voluntary consumer product safety standard that would eliminate or adequately reduce the risk of injury addressed by the proposed rule; and

(4) a description of any reasonable alternatives to the proposed rule, together with a summary description of their potential costs and benefits, and a brief explanation of why such alternatives should not be published as a proposed rule.

The Commission shall transmit such notice within 10 calendar days to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives. *Any proposed consumer product safety rule shall be promulgated within 12 months after the date of publication of an advance notice of proposed rulemaking under subsection (a) of this section relating to the product involved, unless the Commission determines that such proposed rule is not likely to eliminate or reduce the risk of injury associated with the product. The Commission may extend for not more than 180 days for good cause the one-year period.*

(d) through (h) * * *.

Section 19 of that Act

PROHIBITED ACTS

SEC. 19. (a) It shall be unlawful for any person to—

(1) through (7) * * *

(8) fail to comply with any rule under section 27(e) (relating to provision of performance and technical data); and

[(9) fail to comply with any rule or requirement under section 35 (relating to labeling and testing of cellulose insulation).]

[(10)] *(9)* fail to file a statement with the Commission pursuant to section 18(b).

(b) * * *.

Section 28 of that Act

CHRONIC HAZARD ADVISORY PANEL

SEC. 28. (a) * * *.

(b) Each Panel shall consist of 7 members appointed by the Commission from a list of nominees who shall be nominated by the President of the National Academy of Sciences from scientists—

(1) who are not officers or employees of the United States *(other than employees of the National Institutes of Health, the National Toxicology Program, or the National Center for Toxicological Research)*, and who do not receive compensation from or have any substantial financial interest in any manufacturer, distributor, or retailer of a consumer product; and

(2) who have demonstrated the ability to critically assess chronic hazards and risks to human health presented by the exposure of humans to toxic substances or as demonstrated by the exposure of animals to such substances.

The President of the National Academy of Sciences shall nominate for each Panel a number of individuals equal to three times the number of members to be appointed to the Panel.

(c) through (h) * * *.

Section 32 of that Act

AUTHORIZATION OF APPROPRIATIONS

SEC. 32. (a) There are authorized to be appropriated for the purposes of carrying out the provisions of this Act (other than the provisions of section 27(h) which authorize the planning and construction of research, development, and testing facilities) and for the purpose of carrying out the functions, powers, and duties transferred to the Commission under section 30, not to exceed—

(1) through (7) * * *.

(8) $33,000,000 for the fiscal year ending September 30, 1982; [and]

(9) $35,000,000 for the fiscal year ending September 30, 1983[.]*;*

(10) $37,700,000 for the fiscal year ending September 30, 1988, together with such sums as may be necessary for increases in pay and retirement benefits provided by law;

(11) $37,000,000 for the fiscal year ending September 30, 1989, together with such sums as may be necessary for increases in pay and retirement benefits provided by law; and

(12) $38,300,000 for the fiscal year ending September 30, 1990, together with such sums as may be necessary for increases in pay and retirement benefits provided by law.

For payment of accumulated and accrued leave under section 5551 of title 5, United States Code, severance pay under section 5595 under such title, and other expenses related to a reduction in force in the Commission, there are authorized to be appropriated such sums as may be necessary.

(b) through (c) * * *.

Section 35 of that Act

[INTERIM CELLULOSE INSULATION SAFETY STANDARD

[SEC. 35(a). (1) Subject to the provisions of paragraph (2), on and after the last day of the 60-day period beginning on the effective date of this section, the requirements for flame resistance and corrosiveness set forth in the General Services Administration's specification for cellulose insulation, HH-I-515C (as such specification was in effect on February 1, 1978), shall be deemed to be an interim consumer product safety standard which shall have all the authority and effect of any other consumer product safety standard promulgated by the Commission under this Act. During the 45-day period beginning on the effective date of this section, the Commission may make, and shall publish in the Federal Register, such technical, nonsubstantive changes in such requirements as it deems appropriate to make such requirements suitable for promulgation as a consumer product safety standard. At the end of the 60-day period specified in the first sentence of this paragraph, the Commission shall publish in the Federal Register such interim consumer product safety standard, as altered by the Commission under this paragraph.

[(2) The interim consumer product safety standard established in paragraph (1) shall provide that any cellulose insulation which is produced or distributed for sale or use as a consumer product shall have a flame spread rating of 0 to 25, as such rating is set forth in the General Services Administration's specification for cellulose insulation, HH-I-515C.

[(3) During the period for which the interim consumer product safety standard established in subsection (a) is in effect, in addition to complying with any labeling requirement established by the Commission under this Act, each manufacturer or private labeler of cellulose insulation shall include the following statement on any container of such cellulose insulation: "ATTENTION: This material meets the applicable minimum Federal flammability standard. This standard is based upon laboratory tests only, which do not represent actual conditions which may occur in the home". Such statement shall be located in a conspicuous place on such container and shall appear in conspicuous and legible type in contrast by typography, layout, and color with other printed matter on such container.

[(b) Judicial review of the interim consumer product safety standard established in subsection (a), as such standard is in effect on and after the last day of the 60-day period specified in such subsection, shall be limited solely to the issue of whether any changes made by the Commission under paragraph (1) are technical, nonsubstantive changes. For purposes of such review, any change made by the Commission under paragraph (1) which requires that any test to determine the flame spread rating of cellulose insulation shall include a correction for variations in test results caused by equipment used in the test shall be considered a technical, nonsubstantive change.

[(c)(1)(A) Any interim consumer product safety standard established pursuant to this section shall be enforced in the same manner as any other consumer product safety standard until such time as there is in effect consumer product safety standard promulgated by the Commission, as provided in subparagraph (B), or until such time as it is revoked by the Commission under section 9(e). A violation of the interim consumer product sfety standard shall be deemed to be a violation of a consumer product safety standard promulgated by the Commission under section 9.

[(B) If the Commission determines that the interim consumer product safety standard does not adequately protect the public from the unreasonable risk of injury associated with flammable or corrosive cellulose insulation, it shall promulgate a final consumer product safety standard to protect against such risk. Such final standard shall be promulgated pursuant to section 553 of title 5, United States Code, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. The provisions of section 9(b), (c), and (d) shall apply to any proceeding to promulgate such final standard. In any judicial review of such final standard under section 11, the court shall not require any demonstration that each particular finding made by the Commission under section 9(c) is supported by substantial evidence. The court shall affirm the action of the Commission unless the court determines that such action is not supported by substantial evidence on the record taken as a whole.

[(2)(A) Until there is in effect such a final consumer product safety standard, the Commission shall incorporate into the interim consumer product safety standard, in accordance with the provisions of this paragraph, each revision superseding the requirements for flame resistance and corrosiveness referred to in subsection (a) and promulgated by the General Services Administration.

[(B) At least 45 days before any revision superseding such requirements is to become effective, the Administrator of the General Services Administration shall notify the Commission of such revision. In the case of any such revision which becomes effective during the period beginning on February 1, 1978, and ending on the effective date of this section, such notice from the Administrator of the General Services Administration shall be deemed to have been made on the effective date of this section.

[(C)(i) No later than 45 days after receiving any notice under subparagraph (B), the Commission shall publish the revision, in-

cluding such changes in the revision as it considers appropriate to make the revision suitable for promulgation as an amendment to the interim consumer product safety standard, in the Federal Register as a proposed amendment to the interim consumer product safety standard.

[(ii) The Commission may extend the 45-day period specified in clause (i) for an additional period of not more than 150 days if the Commission determines that such extension is necessary to study the technical and scientific basis for the revision invovled, or to study the safety and economic consequences of such revision.

[(D)(i) Additional extensions of the 45-day period specified in subparagraph (C)(i) may be taken by the Commission if—

[(I) The Commission makes the determination required in subparagraph (C)(ii) with respect to each such extension; and

[(II) in the case of further extensions proposed by the Commission after an initial extension under this clause, such further extensions have not been disapproved under clause (iv).

[(ii) Any extension made by the Commission under this subparagraph shall be for a period of not more than 45 days.

[(iii) Prior notice of each extension made by the Commission under this subparagraph, together with a statement of the reasons for such extension and an estimate of the length of time required by the Commission to complete its action upon the revision involved, shall be published in the Federal Register and shall be submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives.

[(iv) In any case in which the Commission takes an inital 45-day extension under clause (i), the Commission may not take any further extensions under clause (i) if each committee referred to in clause (iii) disapproves by committee resolution any such further extensions before the end of the 15-day period following notice of such initial extension made by the Commission in accordance with clause (iii).

[(E) The Commission shall give interested persons an opportunity to comment upon any proposed amendment to the interim consumer product safety standard during the 30-day period following any publication by the Commission under subparagraph (C).

[(F) No later than 90 days after end of the period specified in subparagraph (E), the Commission shall promulgate the amendment to the interim consumer product safety standard unless the Commission determines, after consultation with the Secretary of Energy, that—

[(i) Such amendment is not necessary for the protection of consumers from the unreasonable risk of injury associated with flammable or corrosive cellulose insulation; or

[(ii) implementation of such amendment will create an undue burden upon persons who are subject to the interim consumer product safety standard.

[(G) The provisions of section 11 shall not apply to any judicial review of any amendment to the interim product safety standard promulgated under this paragraph.

[(d) Any Federal department, agency, or instrumentality, or any Federal independent regulatory agency, which obtains information

which reasonably indicates that cellulose insulation is being manufactured or distributed in violation of this Act shall immediately inform the Commission of such information.

[(e)(1) The Commission, no later than 45 days after the effective date of this section shall submit a report to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign detailed statement of the manner in which the Commission intends to carry out the enforcement of this section.

[(2)(A) The Commission, no later than 6 months after the date upon which the report required in paragraph (1) is due (and no later than the end of each 6-month period thereafter), shall submit a report to each committee referred to in paragraph (1) which shall describe the enforcement activities of the Commission with respect to this section during the most recent 6-month period.

[(B) The first report which the Commission submits under subparagraph (A) shall include the results of tests of cellulose insulation manufactured by at least 25 manufacturers which the Commission shall conduct to determine whether such cellulose insulation complies with the interim consumer product safety standard. The second such report shall include the results of such tests with respect to 50 manufacturers who were not included in testing conducted by the Commission for inclusion in the first report.

[(f)(1) The Commission shall have the authority to require that any person required to comply withthe certification requirements of section 14 with respect to the manufacture of cellulose insulation shall provide for the performance of any test or testing program required for such certfication through the use of an independent third party qualified to perform such test or testing program. The Commission may impose such requirement whether or not the Commission has established a testing program for cellulose insulation under section 14(b).

[(2) The Commission, upon petition by a manufacturer, may waive the requirements of paragraph (1) with respect to such manufacturer if the Commission determines that the use of an independent third party is not necessary in order for such manufacturer to comply with the certification requirements of section 14.

[(3) The Commission may prescribe such rules as it considers necessary to carry out the provisions of this subsection.

[(g) There are authorized to be appropriated, for each of the fiscal years 1978, 1979, 1980, and 1981, such sums as may be necessary to carry out the provisions of this section.]

Federal Hazardous Substances Act

Section 3 of that Act

REGULATIONS DECLARING HAZARDOUS SUBSTANCES AND ESTABLISHING VARIATIONS AND EXEMPTIONS

Sec. 3. (a) * * * *

(b) through (f) * * * *

(g)(1) If the Commission determines that any standard submitted to it in response to an invitation in a notice published under subsection (f)(5) if promulgated (in whole, in part, or in combination

with any other standard submitted to the Commission or any part of such a standard) as a regulation under section 2(q)(1) or subsection (e) of this section, as the case may be, would eliminate or adequately reduce the risk of injury identified in the notice provided under subection (f)(1), the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed regulation under such section or subsection.

(2) If the Commission determines that—

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (f)(6) is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standards,

the Commission shall terminate any proceeding to promulgate a regulation under section 2(q)(1) or subsection (e) of this section, respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury.

(3) The Commission shall devise procedures to monitor compliance with any voluntary standards—

(A) upon which the Commission has relied under paragraph (2) of this subsection;

(B) which were developed with the participation of the Commission; or

(C) whose development the Commission has monitored.

(h) through (i) * * *.

(j)(1) With respect to any article or substance for which a petition has been filed under section 553(e) of title 5, United States Code, any interested party may petition the Commission for review of any voluntary standard. Such party may only file such petition on the basis that—

(A) there is a risk of injury associated with the article or substance, the voluntary stanard is intended to address such risk or injury, and the voluntary standard is inadequate to address such risk of injury; or

(B) the development of the voluntary standard is not proceeding in a timely manner.

(2) The Commission may hold a hearing on any petition filed under this subsection. The Commission shall approve or deny such petition within 120 days after it is filed, except that the Commission may extend such time period for not to exceed 60 days for good cause. The Commission shall file notice of such petition and any extension of such time period in the Federal Register. If the Commission approves such petition, it shall specify the action which the Commision will take in response to the petition. If the Commission denies such petition, it shall state the reasons for such denial. Any approval or denial of such a petition shall be considered final agency action for purposes of judicial review.

(3) The Commission may consider together any petitions filed under this subsection if such petitions concern the same article or

substance and state basis for the petition under paragraph (1) of this subsection.

(4) As used in this subsection, the term "interested party" means—

(A) any consumer who is injured by an article or substance with respect to which a voluntary standard exists or is in the process of development;

(B) the survivor of any consumer specified in subparagraph (A) of this paragraph;

(C) a national organization representing consumer interests; or

(D) an official of a State or local government with responsibility for safety of articles or substances.

FLAMMABLE FABRICS ACT

Section 4 of that Act

REGULATION OF FLAMMABLE FABRICS

SEC. 4. (a) * * *.

(b) through (g) * * *.

(h)(1) If the Commissioner determines that any standard submitted to it in response to an invitation in a notice published under subsection (g)(5) if promulgated (in whole, in part, or in combination with any other standard submitted to the Commission or any part of such a standard) as a regulation, would eliminate or adequately reduce the risk of injury identified in the notice provided under subsection (g)(1), the Commission may publish such standard, in whole, in part or in such combination and with nonmaterial modifications, as a proposed regulation under this section.

(2) If the Commission determines that—

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (g)(6) is likely to result in the elimination of adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard,

the Commission shall terminate any proceeding to promulgate a regulation respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury.

(3) The Commission shall devise procedures to monitor compliance with any voluntary standards—

(A) upon which the Commission has relied under paragraph (2) of this subsection;

(B) which were developed with the participation of the Commission; or

(C) whose development the Commission has monitored.

(i) through (j) * * * *

(k)(1) With respect to any fabric, related material, or product for which a petition has been filed under section 553(e) of title 5, United States Code, any interested party may petition the Commis-

sion for a review of any voluntary consumer product safety standard. Such party may only file such petition on the basis that—

(A) there is a risk of injury associated with the fabric, related material, or product, the voluntary standard is intended to address such risk of injury, and the voluntary standard is inadequate to address such risk of injury; or

(B) the development of the voluntary standard is not proceeding in a timely manner.

(2) The Commission may hold a hearing on any petition filed under this subsection. The Commission shall approve or deny such petition within 120 days after it is filed, except that the Commission may extend such time period for not to exceed 60 days for good cause. The Commission shall file notice of such petition and any extension of such time period in the Federal Register. If the Commission approves such petition, it shall specify the action which the Commission will take in response to the petition. If the Commission denies such petition, it shall state the reasons for such denial. Any approval or denial of such petition shall be considered final agency action for purposes of judicial review.

(3) The Commission may consider together any petitions filed under this subsection if such petitions concern the same consumer product and state the same basis for the petition under paragraph (1) of this subsection.

(4) As used in this subsection, the term "interested party" means—

(A) any consumer who is injured by a fabric, related material, or product with respect to which a voluntary standard exists or is in the process of development.

(B) the survivor of any consumer specified in subparagraph (A) of this paragraph;

(C) a national organization representing consumer interests; or

(D) an official of a State or local government with responsibility for the safety of fabrics, related materials, or products.

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